



THE INDIAN LAW REPORTS, BOMBAY SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT BOMBAY, AND BY THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON
APPEAL FROM THAT COURT.

Names of Reporters.

PRIVY COUNCIL.

C. BOULNOIS, Middle Temple.

HIGH COURT.

I. C. KIRKPATRICK, Lincoln's Inn.

JANPAT SADASHIV RAY.

JANGARAM BAPSODA RELE.

} *Assistants.*

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1918.

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„ SIR PRAMADA CHARAN BANERJI, KT.

„ WILLIAM TUDBALL, I. C. S. *(On deputation from 9th December).*

„ MUHAMMAD RAFIQ *(On leave from the 1st March to the 8th August).*

„ THEODORE CARO PIGGOTT, I. C. S.

CECIL HENRY WALSH, K. C.

„ SAIYID ABDUL RAOOF *(Officiated from the 4th March to the 8th August).*

„ ALFRED EDWARD RYVES *(Officiated from the 15th May to the 6th July).*

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of February, 1916, and was delivered on the 4th of March, 1916. At the hearing of the appeal a preliminary point was raised that the appeal was filed beyond time. The appellant contended that the time occupied in obtaining the copy of the judgement of the first court should also be excluded, and if that was done the appeal would be within time. The question whether the appeal was presented beyond time was referred to a Full Bench.

Babu *Piari Lal Banerji* (with Mr. *S. A. Haidar*) for the appellant, raised the question as to who should begin. He submitted that the appeal itself was not before the Full Bench; if that had been the case, and the respondent had a preliminary objection, then the respondent would be heard first. The sole point for determination by the Full Bench was whether or not the time occupied in obtaining the copy of the judgement of the first Court should be deducted in computing the period of limitation. On this point he who asserted the affirmative should begin.

The Court intimated that the party who raised the question itself should be first heard.

Dr. *Surendra Nath Sen* (with him *Munshi Gulzari Lal*) for the respondent:—

The appeal is barred by time. There is no provision of law which entitles the appellant to a deduction of the time required to obtain the copy of the first court's judgement. The language of section 12 of the Limitation Act is very clear. Clause (2) excludes the time requisite for a copy of the *decree* appealed from; and clause (3) excludes the time requisite for a copy of the judgement on which "it," i.e., the decree appealed from, is founded. In the present case the decree appealed from being that of the lower appellate court, the judgement indicated by clause (3) is the judgement of the lower appellate court, upon which the said decree is founded. The judgement of the first court comes neither under clause (2) nor under clause (3). The judgement was in the appellant's favour, and is certainly not the "judgement complained of." The appellant may seek to invoke the aid of rule 2, chapter III, of the rules of Court, as it now stands after the amendment which was published in the local Gazette of the 24th

of July, 1915.* That rule, however, does not help the appellant ; it does not say anything about limitation of the exclusion of any period of time. The important words of the Rule are "shall be *presented*," and its whole scope is confined to the question of the proper *presentation* of an appeal. It has nothing to do with any question of limitation. In the present case there is no question whether the appeal was or was not properly *presented*; admittedly it was, as the requirements of the rule were complied with. That being so, the function of the Rule comes to an end. But after that the question arises "was the appeal presented within time?" It cannot be seriously contended that the rule mentioned above was either intended or competent to graft an important addition to the provisions of section 12 of the Limitation Act. And the rule does not profess to do so. Order XLI, rule 1, read with section 108, Civil Procedure Code, says nothing about a copy of the judgement of the first court. The Rule was framed by the High Court, as a matter of procedure in the presenting of appeals, under the powers conferred by section 122, Civil Procedure Code. The Rule has not inaugurated any great novelty; so far back as in the Code of 1859, we find the rule incorporated in section 373 thereof. Turning now to decided cases, there are, no doubt, rulings under the Code of 1859 favouring the exclusion of the time required to obtain a copy of the judgement of the first court. But it must be remembered that no codified provision on the subject, like that of section 12 of the present Limitation Act, was contained in Act XIV of 1859, and so the courts could exercise greater latitude in dealing with the matter. The following cases have some bearing, more or less on the subject: *Pirathi Sing v. Vencatramnayyan* (1) and *Chunnilal Jethabhai v. Barot Dahyabhai Amulakh* (2), where it was held that

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* Chapter III, rule 2, of the rules of the High Court:—"No memorandum of appeal from an appellate decree or from any order shall be presented unless accompanied by a copy of the decree or order appealed against and, where it exists, a copy of the judgement of the court of first instance. In all cases in which either or both of the judgements above mentioned is or are not in English, the memorandum of appeal shall also be accompanied by a translation in the English language of such judgement or judgements made by a translator on the establishment of a Civil Court or certified as correct by an authorized translator of the High Court."

(1) (1892) I.L.R., 4 Mad., 419.

(2) (1907) I.L.R., 32 Bom., 14.

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the essential accompaniments of a memorandum of appeal were those prescribed by order XLI, rule 1, and section 108, Civil Procedure Code; that the additional accompaniments required by the High Court rule were extraneous; and that the language of section 12 of the Limitation Act and the fact that it was framed with due regard to the said provisions of the Civil Procedure Code and that it applied equally to first appeals and second appeals gave rise to the necessary implication that deduction of the time taken to obtain a copy of the first court's judgement was not intended by the Legislature; *Ramchandra Sadashiv v. Laxman Sadashiv* (1) and *Sadashiva Raghunath v. Ramchandra Chintaman* (2) are contradictory cases. The case of *Fazal Muhammad v. Phul Kuar* (3) may also be mentioned by way of analogy.

Babu *Piari Lal Banerji* for the appellant :—

Tracing back the history of legislation on the subject it will be seen that the course of legislation has, from the beginning, run on two parallel lines, the first prescribing from time to time the necessary accompaniments of a memorandum of appeal and the second making corresponding provisions for exclusion of the time required to furnish those accompaniments. The two have always been correlative and commensurate. Section 373 of the Code of Civil Procedure of 1859 (Act VIII of 1859) required copies of judgements and decrees to be filed. There was no provision for exclusion of the time requisite for such copies in the corresponding Limitation Act, XIV of 1859, because the Code of Civil Procedure itself provided for the matter by section 333. That section, however, in terms allowed deduction of the time required for obtaining a copy only of the "decree"; it was silent about the "judgement." But the courts promptly stepped in to remove this defect and the consequent hardship, and ruled that the time taken to obtain a copy of the judgement should also be deducted; *Hossanee Begum v. Dumree Mahtoon* (4). Section 13 of the Limitation Act, IX of 1871, reproduced section 333 of Act VIII of 1859, and the subject of the exclusion of time requisite for copies was taken out of the domain of the Code of Civil

(1) (1906) I. L. R., 31 Bom., 162 (3) (1879) I. L. R., 2 All., 192.

(2) (1903) 5 Bom. L. R., 394. (4) (1865) 2 W. R., (Mis. App.) 51.

Procedure and incorporated in the Limitation Act. But the decision in 2 W. R., 51, cannot be followed. In 1875, however, that case was overruled by the Full Bench case of *Juggunnath Singh v. Shewaruttun Singh* (1). The divergence created by the Full Bench ruling between the two branches of legislation was soon remedied. In 1877 the Legislature stepped in, and by enacting section 541 of the Code of Civil Procedure (X of 1877) and the third paragraph of section 12 of the Limitation Act, XV of 1877, brought the two subjects into line again. Thus it appears that whenever in the past confusion and hardship have arisen in this matter, the courts or the Legislature have stepped in and taken measures to prevent injustice. It is submitted that this Bench may lay down that as a matter of general practice with reference to this rule the Court should in such cases give the appellant the benefit of section 5 of the Limitation Act. In the case in I. L. R., 32 Bom., 14, which has been cited by the respondent, the Bombay High Court was much impressed by the hardship which a similar rule of its own was likely to cause, and was led to declare the rule to be *ultra vires* rather than to allow it to cause hardship. It is submitted that the present rule is also *ultra vires*, because its effect is, in practice, to modify and cut down the period allowed by the Limitation Act. The rule imposes an additional hardship on the appellant over and above the requirements prescribed by the Legislature and may in many cases operate very seriously to encroach upon the period which is by law allowed for appeal and thereby to prejudice the rights and privileges of an appellant. Conceivably, it might take, say, 95 days to obtain the copy of the first court's judgement. The court could, no doubt, give relief under section 5 of the Limitation Act, but that would be reducing the appellant to sue for grace, which might or might not be given, for a matter to which he ought to be entitled as of right. There seems no reason why the appellant should be placed in a different position with respect to the copy of the first court's judgement from that in respect of the copy of the appellate judgement, if he is equally required to file both.

KNOX, A. C. J., and BANERJI and TUDBALL, JJ.:—The question that has been referred to this Full Bench for decision is

(1) (1875) 24 W. R., 105.

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whether the appeal, out of which the question arises, is barred by limitation or not?

In order to decide this point it is necessary to consider first the date on which the judgement of the lower appellate court was passed and the days that it took the appellant to obtain copies of the judgement and decree complained of. The judgement was pronounced on the 3rd of December, 1915. We find from the record that an application for the copy both of the judgement and decree was made on the 7th of December, 1915, and that that copy could have been obtained on the 18th of December, 1915. The appellant therefore had at his disposal the ninety days prescribed for the appeal *plus* a period of twelve days, the time requisite to obtain copies of the judgement and decree complained of. The appeal was filed in this Court on the 15th of March, 1916, and was thus one day beyond the time allowed by the Indian Limitation Act. *Prima facie*, therefore, it appears that the appeal at the time when it was presented to this Court was barred. But the appellant seeks to call to his aid a period of another eleven days, more or less, and the ground on which he seeks the addition of this period is that under rule 2, chapter III, this Court has made a rule that "no memorandum of appeal from an appellate decree or from any order shall be presented unless accompanied by a copy of the decree or order appealed against and, where it exists, a copy of the judgement of the court of first instance." His contention is that, as he could not present his memorandum of appeal unless it was accompanied by the copy of the judgement of the court of first instance, he can claim the additional period which was requisite for the obtaining of the copy of the said judgement. In the present case that period was a period of eleven days. When the memorandum of appeal was presented to this Court it was as a matter of fact accompanied by the documents which the Code of Civil Procedure and the rule of this Court required should accompany it. But, as we have already stated above, the date of presentation was one day beyond the period of time allowed by the Indian Limitation Act. Now section 12, of the Indian Limitation Act is perfectly clear and its language in no way ambiguous. It lays down in clause (3) of section 12 of the Act that "where a decree is appealed from or sought to be

reviewed, the time requisite for obtaining a copy of the judgement on which it is founded shall also be excluded." No further is said, and we are unanimous in holding that the Court has no power by any rule that it may make to alter the period of limitation prescribed by the Indian Limitation Act. We would further say that the rule as it stands was never intended to and can in no way be construed as altering in any way the Indian Limitation Act. This Court has power to alter, amend and add to rules of procedure laid down by the Code of Civil Procedure, vide section 122, but nowhere has any power been given to it to touch the Limitation Act. Our answer then to the question which has been sent to us is that the present appeal is barred by limitation.

We have not got to determine whether this is a case in which the provisions of section 5 of the Limitation Act are to be applied. That is a matter for the Bench hearing the appeal.

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APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

AFZAL SIAH AND ANOTHER (PLAINTIFFS) v. LACHMI NARAIN AND
[OTHERS (DEFENDANTS).*

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*Civil Procedure Code (1908), order I, rule 8; order XXIII, rule 1—Procedure—
Suit dismissed for misjoinder of parties and of causes of action—Plaintiff
permitted to withdraw suit on terms with liberty to bring fresh suits.*

Where it was found on second appeal to the High Court that the suit out of which the appeal had arisen was bad for misjoinder of parties and of causes of action, in that there was no community of interest between the various defendants, whose sole connection with each other was that they were purchasers of different portions of property, the whole of which was claimed by the plaintiff, the High Court permitted the suit to be withdrawn on terms as to costs, with liberty to the plaintiff to bring separate suits against each of the defendants.

THE facts of this case were as follows:—

The plaintiffs purchased certain items of immovable property in one lot at a sale held in execution of a decree. Somehow the same property again came to be sold, as belonging to the former

* Second Appeal No. 373 of 1916, from a decree of Durga Dat Joshi, First Additional Judge of Aligarh, dated the 4th of December, 1915, modifying a decree of Banke Behari Lal, Additional Subordinate Judge of Aligarh, dated the 14th of March, 1913.

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owner, in execution of decrees against him, and was purchased at auction in separate lots by different purchasers, who obtained possession. The plaintiffs then brought a suit against these purchasers for a declaration of their own title by their prior purchase, for possession and for mesne profits. Each defendant or set of defendants was in possession only of the item purchased by him or them, respectively, there was no allegation of conspiracy among the purchasers. Both the lower courts dismissed the suit as being bad for multifariousness. The plaintiffs appealed to the High Court.

Dr. *S. M. Sulaiman*, for the appellants, contended in the first place that the suit was maintainable. Order I, rule 3, of the Code of Civil Procedure was wide enough to cover the case. The right to relief was alleged to exist against the defendants either jointly, severally or in the alternative, and the question common to them all was whether the whole of the rights in the property had passed to the plaintiffs or any portion had been left over which could pass to a subsequent purchaser. Order I, rule 3, applied to questions of joinder of causes of action as well as to questions of joinder of parties; *Ramendra Nath Ray v. Brojendra Nath Duss* (1). The plaintiffs' title in respect of all the items was one and the same; and the relief regarding declaration of title was common against all the defendants. Reference was also made to order I, rules, 4, 5, 7; order II, rule 3, and order VII, rule 8. In the next place it was submitted that, even if the suit was defective by reason of multifariousness, it should not have been dismissed altogether. There was no provision in the Code of Civil Procedure laying down that a suit was to be dismissed for misjoinder of causes of action. The courts should have asked the plaintiffs to confine the suit to one cause of action, and given them an opportunity to amend the plaint. The following cases were relied on: *Behari Lal v. Kodu Ram* (2) and *Baij Nath v. Chhowaro* (3).

The Hon'ble Dr. *Tej Bahadur Sapru* (with him *Munshi Panna Lal*) for the respondents, contended that the suit as brought could not be proceeded with. Two conditions were laid down by order I, rule 3, itself before it could be applied, and the first was that the right to relief must be "in respect of or arising

(1) (1917) 21 C. W. N., 794. (2) (1893) I. L. R., 15 All., 360.

(3) (1903) I. L. R., 26 All., 218.

out of the same act or transaction or series of acts or transactions." This condition was not satisfied by the present case. Order I, rule 5, was governed by order I, rule 3. Order I, rule 3, applied only to misjoinder of parties and not to misjoinder of causes of action. The leading case on the subject of multifariousness was that of *Sadler v. The Great Western Railway Co.* (1). Separate torts committed by separate defendants could not be joined together in one suit. Separate acts of trespass by separate individuals upon different items of property could not be made the subject-matter of the same suit. The following case was also cited: *Gower v. Gouldridge* (2). There were two later cases which at first sight might seem to run counter to the cases mentioned above, they were *Frankenburg v. Great Horseless Carriage Co.* (3) and *Compania Sansinena de Carnes Congeladas v. Houlder Brothers & Co* (4). But in reality there was no conflict; for, in the first case it was held that in substance there was only one cause of action, and in the second it was held that the two defendants could be regarded as being principal and agent. In the lower courts the plaintiffs did not choose to ask for an opportunity to amend the plaint or to take any other steps to remedy the defect in the suit.

Dr. S. M. Sulaiman, in reply, submitted that order I, rule 3, made a distinction between one cause of action being *alleged* to exist and separate causes of action being *found* to exist. The fact that it was found on the evidence that the defendants were separately in possession would not affect the fact that the cause of action was *alleged* against them jointly. An application was then made on behalf of the appellants praying for leave under order XXIII, rule 1, to withdraw the suit with liberty to bring a fresh suit or suits, and was opposed by the respondents.

PICGOTT and WALSH, JJ. :—This is a second appeal which comes before us under the following circumstances. The plaintiffs alleged themselves to have acquired certain property at public auction. They alleged that, under circumstances perhaps amounting to fraud on the part of the judgment-debtor, the property was put up to sale a second time and was purchased in different lots by different persons. On this they impleaded three different

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(1) (1896) A. C., 450.

(3) (1900) 1 Q. B., 504.

(2) (1898) 1 Q. B., 343

(4) (1910) 2 K. B., 354.

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sets of defendants, claiming a declaration of their own title, recovery of possession, and mesne profits. Separate defences were filed by the members of the different sets of defendants, and in each of these defences the particular defendant concerned protested that he had nothing to do with the property specified in the plaint, except only one single item of the same. Arising out of this plea of fact, the point was taken that the suit was bad for misjoinder of causes of action and that each defendant, or set of defendants, should have been separately sued for ejectment as a trespasser in respect only of such items of property as were in the possession of such defendant or defendants severally. A curious feature of the case was that, when the pleadings of the parties were complete, it was apparent that a portion of the property specified in the plaint was not claimed by any of the defendants at all, that is to say, the plaintiffs were claiming to recover possession of some property from defendants who repudiated having anything to do with it. In the result the court of first instance dismissed the suit, and this dismissal has been affirmed by the Additional District Judge in appeal. The only point dealt with by the lower appellate court was that the suit was bad for multifariousness. As a matter of fact there had been an order by the predecessor in office of the learned Judge who finally disposed of the appeal, which was no doubt well intended, being an effort on the part of the court to bring the question in dispute to a final adjudication; but the actual effect of that was to make the confusion worse. The learned Judge directed the plaintiffs to implead a number of fresh defendants, presumably on the ground that they were the persons in possession of those portions of the property in suit which were not claimed by any of the original defendants. This order was complied with in a curious fashion by the addition of two new defendants in the specification of defendants in the plaint, without the addition of any statement of any sort or kind in the body of the plaint to suggest what the cause of action against the defendants thus added was supposed to be. However, the suit having been, as already stated, dismissed by the lower appellate court, the plaintiffs come to this Court in second appeal, and in their memorandum of appeal as drafted they simply call in question the finding of law on which their suit was dismissed by

the court below. The pleas in the memorandum of appeal are that the suit is not bad for multifariousness, that it was maintainable as framed and that the reliefs claimed therein could have been granted in one suit against all the defendants. It is unnecessary for us, as the case now stands, to go further into this matter beyond saying that we could not have acceded to this contention. There was no allegation in the plaint of any joint action or community of interest as between the different sets of defendants. If the principle suggested by the memorandum of appeal before us were correct, it would follow that any owner of property might bring one single suit against an unlimited number of wholly unconnected trespassers on different portions of his property, merely on the ground that he himself owned the entire property under a single title. This is a proposition which could not be affirmed. It is idle for the appellants to refer us to those rules in the Civil Procedure Code which refer to the circumstances under which different defendants may be jointly impleaded on a single cause of action. The present is not a case of an alleged misjoinder of defendants on a single cause of action, but of alleged misjoinder of causes of action. In the course of arguments before us it was strongly represented to us on behalf of the plaintiffs appellants that their suit ought not to have been allowed to fail altogether upon such a merely technical ground. Various suggestions were put forward as to the manner in which the defect, if found to exist, might be remedied. Finally, we gave the plaintiffs time to consider their position, in order that they might, if they thought fit, apply to this Court for permission to withdraw from the suit under order XXIII, rule 1, of the Code of Civil Procedure. An application to this effect has now been laid before us, and we have heard both parties concerning it. The jurisdiction of this Court to take action under the rule above mentioned, even at the stage of second appeal, is not questioned, and such jurisdiction has from time to time been exercised in suitable cases. Neither can it be denied that the suit now before the Court is one which must fail by reason of a formal defect, namely, that of misjoinder of causes of action in a single suit ; that is to say, the error made by the plaintiffs in filing one single suit when they ought to have brought three or more, is clearly a defect of a formal nature having nothing to do

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with the merits or otherwise of the plaintiffs' claim. The only question therefore for us to consider is whether this is a proper case for the exercise of our discretion in favour of the plaintiffs. On a fair consideration of the matter it seems to us that, subject to full compensation being made to the defendants in the matter of costs for the expenses to which they have been subjected up to this stage in the litigation, the case is a suitable one for permitting the plaintiffs to abandon the untenable position which they took up when they filed this suit, leaving their rights otherwise unimpaired, so that they may seek redress from the law for any wrong which they may have suffered by the institution of such properly framed suit or suits as may be found to be necessary. First, we make the order which we propose to pass subject to this condition that all costs incurred up to this date by any of the defendants respondents in all three courts are hereby made payable by the plaintiffs appellants. Subject to this condition, we set aside the decrees of both the courts below and in place thereof pass an order permitting the plaintiffs to withdraw from the present suit with liberty to institute such fresh suit, or rather fresh suits, in respect of the subject matter of the present suit as they may be legally advised.

Suit withdrawn.

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 August, 7.

Before Mr. Justice Tudball and Mr. Justice Walsh.

QASIM ALI KHAN (JUDGEMENT-DEBTOR) v. BHAGWANTA KUNWAR
 (DECREE-HOLDER).*

Civil Procedure Code (1908), section 47; order XLI, rule 1—Execution of decree—Appeal—Limitation—Copy of decree or final order necessary to the filing of an appeal.

On an objection taken by the judgement-debtor that the execution of a decree was barred under section 48 of the Code of Civil Procedure, the Court, in disallowing the objection, wrote a judgement and also drew up a formal order, or decree, being the formal expression of the decision of the question.

Held that order XLI, rule 1, of the Code applied, and no valid appeal could be filed against the decision of the court below which was not accompanied by a copy of such formal order, or decree. *Khirode Sundari Devi v. Janendra Nath Pal Chaudhuri* (1) discussed.

* First Appeal No. 41 of 1917, from a decree of Suraj Narain Majju, Subordinate Judge of Azamgarh, dated the 23rd of September, 1916.

(1) (1901) 6 C. W. N., 283.

THIS appeal arose out of an application for execution of a decree for sale obtained in 1897. The judgement-debtors raised an objection that execution of the decree was barred under section 48 of the Code of Civil Procedure. The execution court (Subordinate Judge of Azamgarh) disallowed the objection. In so doing the Subordinate Judge wrote a judgement, which was delivered on the 23rd of September, 1916. He also drew up a formal order, or rather a decree, that is to say, a formal expression of his decision of the question.

On the 9th of December the judgement-debtor applied for a copy of the judgement only, which was ready on the 14th. On the 2nd of January, 1917, an appeal was filed in the High Court, accompanied only by a copy of the judgement of the 23rd of September, 1917. A copy of the decree was only obtained some time in January, 1917, and was filed in court on the 2nd of February, 1917, long after the expiry of the period of limitation. On the appeal coming on for hearing the respondent took a preliminary objection that no valid appeal had been filed within limitation.

Babu *Kamal Kant Varma*, for the appellant.

Dr. *S. M. Sulaiman*, for the respondent.

TUDBALL, J.—The facts of this case are as follows:—The respondent's predecessor in title obtained a decree for sale against the appellant and others in the year 1897. Execution of the decree was obtained on many occasions, but the decree has not yet been satisfied. Another application for execution has now been made. The present appellant and one other objected that the execution of the decree was barred under section 48 of the Code of Civil Procedure. The court below, relying on a ruling of this Court that the rule laid down in section 48 did not govern the case of mortgage decrees passed prior to the coming into force of the present Code of Civil Procedure, disallowed the objection. In so doing the Subordinate Judge wrote a judgement, which was delivered on the 23rd of September, 1916. He also drew up a formal order, or rather a decree, i.e., a formal expression of his decision of the question. The present appellant took no further step in the matter until the 9th of December, 1916, when he applied for a copy of the judgement only, and

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this was ready for him on the 14th of December, 1916. The period of ninety days allowed by law for an appeal expired on the 23rd of December, but allowing six days spent in obtaining the copy of the judgement, the period expired during the Christmas vacation. On the 2nd of January, 1917, he came to Allahabad and his vakil directed him to obtain and file a copy of the decree. On that date a memorandum of appeal with the copy of the judgement only was filed in Court. The appellant applied for and obtained a copy of the decree in the second half of January, 1917, and he finally produced it in Court on the 2nd of February, 1917. A preliminary objection is taken that the appeal was not filed within time and is barred by limitation. It is urged that this is an appeal from a decree and that in accordance with the provisions of order XLI, rule 1, the memorandum of appeal must be accompanied by a copy of the decree appealed from, and also of the judgement on which it is founded (unless the Court dispenses with the latter). The copy of the decree in the present case was not filed until long after the period for appeal had passed. In fact no application for it was made within the period of limitation, and *prima facie* this objection seems well founded. On behalf of the appellant, however, it is urged that the decree in the present case is not the formal expression of the court's decision, but is the document of the 23rd of September, 1916, which I have described above as the judgement. It is urged that the definition of decree in section 2, clause (2), clearly lays it down that in a case like the present, arising under section 47 of the Code of Civil Procedure, the decree is the determination of the "question" i.e., the court's decision embodied in what I have designated the judgement, that that was filed with the memorandum of appeal on the 2nd of February, 1917, and the appeal is therefore within time. In support of this argument, reliance is placed upon a decision of a Bench of the Calcutta High Court in *Khironde Sundari Debi v. Janendra Nath Pal Chaudhuri*, (1) reported in the Calcutta Weekly Notes, Volume VI, page 283. In this case the judgement shows that no formal expression of the court's decision was drawn up. Whatever there was on record was in one document, a copy of which was filed. It was held that "*the order itself is the decree and no other decree is*

(1) (1901) 6 C. W. N., 283.

necessary." I find it impossible to agree that the order itself is the decree and no other decree is necessary. The Code defines a judgement as the statement given by the Judge of the grounds of a *decree* or *order*. The "decree" is the *formal* expression of an adjudication which conclusively determines the rights of the parties. It is *this* formal adjudication (and not the judgement) which determines the questions between the parties. The word "decree" includes the "determination of a question within section 47." To my mind it is quite clear that the determination of such questions is in the "formal" expression of the court's adjudication on the points. The judgement gives merely the grounds for the decision. In the case of "orders" also the Code clearly distinguishes between the judgement, i.e., the grounds of the order and the "order" itself, which is the formal expression of the decision. An Indian "judgement" is not to be confused with an English judgement. The latter corresponds to the formal decree or order passed in the case. The decision of a question within section 47 would be an "order" and not a decree were it not specially laid down (for the purposes of appeal) that it should be deemed to be a decree.

Order XLI contains the rules applying to appeals from decrees and order XLIII contains those applying to appeals from orders, and rule 2 shows that the rules of order XLI are to be applied, as far as may be, to appeals from orders. Rule 1 of order XLI clearly makes it an inflexible rule that in the case of appeals from decrees the memorandum of appeal shall be accompanied by a copy of the decree. The court cannot dispense with it.

In the case of appeals from orders, it makes it equally compulsory to file a copy of the "order" and that word is defined clearly in section 2 and is something apart from and different from the judgement. This Court has always insisted on subordinate courts drawing up a formal order. In the list of papers which go to form File A of part I of a record, No. 14 is the judgement and No. 15 is the "decree, including decree under section 47" [vide page 40, chapter V, of the General Rules (Civil,) for Subordinate Courts].

The court below prepared both documents, i.e., it wrote its judgement and drew up its decree. If in the present instance

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the appellant's objection to the execution of the decree had been allowed and his costs had been awarded to him, the judgement is not what he would have sought to execute in recovering his costs; he would take a copy of the decree, in which alone would be set forth the costs awarded and recoverable. The practice of the courts is well known and, in my opinion is in accordance with law. The learned vakil, who has argued the point ably and thoroughly, admits that when his client arrived on the 2nd of January, 1917, with a copy of the judgement only, he at once sent him off to get a copy of the decree which was absolutely necessary to enable the appeal to be filed. Moreover, when he filed the memorandum of appeal he asked for time to file the copy of the decree and an *ex parte* order was passed in his favour.

In the Calcutta case, apparently no decree had been prepared, and the omission of the court could not be allowed to prejudice the appellant, and that alone would have sufficed for a decision in his favour on the point. I cannot accept the position that where there is a judgement and a decree based thereon on a question within section 47 of the Code of Civil Procedure, a valid appeal is filed by presenting a memorandum of appeal without a copy of the decree.

An execution proceeding is a proceeding in the suit and the formal decision of a point within section 47 of the Code of Civil Procedure is a decree in that suit *inter partes* and the procedure in an appeal therefrom is that laid down in order XLI. It is impossible to hold that the Legislature intentionally wished to place appeals like the present outside the pale of order XLI and order XLIII and intentionally refrained from laying down any procedure for them.

There therefore was no appeal before the Court until the 2nd of February 1917.

We have, however, been asked to admit this appeal out of time in exercise of the powers granted by section 5 of the Limitation Act. An affidavit has been filed. I am not impressed with it. It does not carry any conviction to my mind as to the truth of the facts alleged therein. To my mind this is one of those cases of negligence and carelessness which so frequently occur. The appellant has no merits. It is not that he has paid

off the debt he owed. He simply relies on a plea of limitation. It is admitted that the decision of the court below is in accordance with a decision of two Judges of this Court. He in turn is met with a counterplea of limitation in this appeal. This is not a hard case. What is sauce for the respondent is in this case sauce for the appellant. I therefore would not admit the appeal out of time.

WALSH, J.—I entirely agree. The Code is quite free from ambiguity upon the point. The Calcutta case may have been rightly decided upon the facts, but, for the reason given by my learned brother, I am unable to agree with its construction of the Code, which was unnecessary for the decision. I agree in dismissing the appeal.

ORDER OF THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

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REVISIONAL CIVIL.

Before Mr. Justice Piggott.

PAHALWAN SINGH (PLAINTIFF) v. JANKI AND OTHERS (DEFENDANTS).
Hindu law—Bond—Suit on bond executed by deceased Hindu against his widow and brothers—Form of decree.

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July 4.

Plaintiff, after the death of the obligor a Hindu, sued his widow and brothers to recover the amount due on a bond. It was found that the obligor and his brothers were joint. *Held* that the plaintiff was still entitled to a decree against the widow which might be executed against any self-acquired property of the deceased obligor in her hands.

THIS was a suit by the obligee of a bond to recover the amount due thereon from the widow and brothers of the obligor, who had died before suit. The bond was proved, but the suit was nevertheless dismissed on the ground that the obligor and his brothers had been joint and that on his death his brothers became the owners of the property by right of survivorship and that his widow inherited nothing. The plaintiff applied in revision to the High Court.

Munshi *Baleshwari Prasad*, for the applicant:—

The bond being proved, the court should have decreed the claim as against any assets of Baldeo which might be in the hands of the defendants. It was not for the court at that stage

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to enter into the question whether Baldeo left any, and, if so, what assets. That question would arise at the time when the decree would be sought to be executed; *Lallu Bhagvan v. Tribhuvan Motiram* (1), *Madho Ram v. Dilbur Mahul* (2), and Civil Revision No. 18 of 1917, decided by KNOX, J., on the 2nd of May, 1917, (Unreported.) It has been found that Baldeo was joint with his brothers. But there is nothing to prevent a member of a joint Hindu family from holding at the same time some self-acquired separate property. If Baldeo left any such property, it would be inherited by the widow and would be his assets in her possession, and the decree could be executed against it. The court should have contented itself with passing, as it was bound to pass, a decree against the assets of Baldeo, if any.

PRIGGOTT, J. — On the findings of the court below there should have been an *ex parte* decree against Musammatt Janki, widow of Baldeo, for the sum claimed, with costs, such decree to be recoverable only against any self-acquired property of the deceased Baldeo which might be found in the possession of the widow. The lower court was quite entitled on the pleadings to try an issue whether Baldeo had died joint or separate from his brothers Chunni, Gokul and Bachchu; and having come to the finding that, at the time of Baldeo's death, the four brothers were members of a joint undivided Hindu family, it has rightly held that the joint family property, whatever it may be, in the hands of the remaining brothers by survivorship could not be liable for a debt incurred by Baldeo, in the absence of any evidence that it was incurred on behalf of the joint family or for the benefit of that family. I doubt whether the modification of the decree of the court below, to which I think the plaintiff is entitled as a matter of law, will be of any particular benefit to him. The object of this application seems to have been to obtain a decree against the brothers. However, as the matter has been taken up in revision by this Court, and as the decree of the court below appears open to objection on this point, I am prepared to modify it. The suit will therefore stand dismissed as against the defendants Chunni, Gokul and Bachchu, with costs both here and in the court below. It will be decreed, with costs in the

(1) (1889) I. L. R., 13 Bom., 653.

(2) (1870) 2 N.-W. P., H. C. Rep., 449.

court below, as against the defendant Musammat Janki, with this proviso, that the amount of the decree will be recoverable only from any self-acquired property of the deceased Baldeo which may be in the possession of this judgement-debtor.

Decree modified.

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REVISIONAL CRIMINAL.

Before Mr. Justice P. U. D. and Mr. Justice P. J. G.

EMPEROR v. RAM SARAN LAL AND ANOTHER *

*Act No. II of 1899 (Indian Stamp Act), section 62, schedule I, article 5—
Stamp—Petition to court intimating compromise of suit—Agreement*

The parties to a suit came to terms out of court, and presented a joint petition to the court stating the terms of compromise arrived at and asking that a consent decree might be given in accordance therewith.

Held that such petition was to be stamped merely as a petition to the court and did not require to be engrossed on a general stamp.

THE facts of this case were as follows:—

One of the accused, Shoo Narain, sued the other accused, Ram Saran Lal, in suit No. 977 of 1916 in the Munsif's court at Farukhabad to recover some money on the basis of a simple mortgage. The parties came to terms out of court. They agreed "orally" that the defendant was to pay down a certain part of the debt in cash; that the plaintiff was to have a decree for the rest of the money payable in annual instalments, and that in case of any default the plaintiff was to be able to execute his decree at once for the whole sum then due. The agreement was not reduced to writing. The parties walked into court and presented a petition to the Munsif praying that a decree might be passed in the case in the terms of the compromise at which they had arrived out of court, and in that petition they informed the court of the terms of the compromise. The court thereupon passed a decree in favour of the plaintiff, but it sent the petition to the stamp officer on the ground that it was an agreement which ought to have been stamped with a general stamp. The Collector directed the prosecution of these two persons for an offence under section 62 of the Act, and they were fined Rs. 5 each.

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* Criminal Reference No. 566 of 1917.

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The case was referred to the High Court by the Sessions Judge, who was of opinion that the document in respect of which the accused had been convicted was no more than a petition to the court and only required an ordinary court fee label.

The applicants were not represented.

The Assistant Government Advocate (Mr. R. Malcomson), for the Crown.

TUDBALL and PIGGOTT, JJ.:—This is a reference by the Sessions Judge of Farrukhabad, in the case of two persons, Ram Saran Lal and Sheo Narain, who have been convicted by a Magistrate under section 62 of the Stamp Act and have been sentenced to a fine of Rs. 5 each. The facts may be very briefly put as follows :—One of the accused, Sheo Narain, sued the other accused, Ram Saran Lal, in suit No. 977 of 1916 in the Munsif's court at Farrukhabad to recover some money on the basis of a simple mortgage. The parties came to terms out of court. They agreed "orally" that the defendant was to pay down a certain part of the debt in cash; that the plaintiff was to have a decree for the rest of the money payable in annual instalments, and that in case of any default the plaintiff was to be able to execute his decree at once for the whole sum then due. The agreement was not reduced to writing. The parties walked into court and presented a petition to the Munsif praying that a decree might be passed in the case in the terms of the compromise at which they had arrived out of court and in that petition they informed the court of the terms of the compromise. The court thereupon passed a decree in favour of the plaintiff, but it sent the petition to the stamp officer on the ground that it was an agreement which ought to have been stamped with a general stamp. The Collector directed the prosecution of these two persons for an offence under section 62 of the Act and they have now been fined Rs. 5 each. The learned Sessions Judge is of opinion that the document in question was a petition to the court requiring only a court fee stamp; that it was unnecessary to have it engrossed upon a general stamp at all; that the conviction was bad in law and should be set aside. In his referring order the Judge has referred to the decision in *Surju Prasad v. Bhawani Sahai* (1), and has distinguished that case from the facts of the

(1) (1879) I. L. R., 2 Ahl., 481

present case. We fully agree with him that the present is a totally different case to the one reported. The Madras High Court in volume 8, page 15, of the Indian Law Reports have gone perhaps a little further even than it is necessary for us to go in the present instance, but we agree that the document in the present case was merely a petition to the court informing it of an agreement into which the parties had orally entered out of court to compromise the suit, and praying for a decree in the terms of the compromise. As such the document did not require to be engrossed upon a general stamp but only required the ordinary court fee label. In our opinion the conviction in this case is bad in law. We set it aside and direct that the fines, if paid, be refunded.

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Conviction set aside.

REVISIONAL CIVIL.

Before Justice Sri Pramad Chandra Banerji.

EMPEROR v JAGRUP SHUKUL.*

Criminal Procedure Code, section 195—Sanction to prosecute—Appeal against order refusing sanction—Munsif of Jaunpur—Additional Sessions and Subordinate Judge of Jaunpur—Act No. XII of 1887 (Bengal, Agia and Assam Civil Courts Act), section 21 (4).

Held that an application to revoke or grant a sanction for a prosecution granted or refused by the Munsif of Jaunpur would lie to the Additional Sessions and Subordinate Judge of Jaunpur.

Held also that a court to which such an application is made is competent to take additional evidence for the purpose of satisfying itself whether sanction ought or ought not to be granted. *Rahmat-ullah v. The Emperor* (1) followed.

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THE facts of this case were as follows :—

A suit was filed in the court of the Munsif of Jaunpur which was dismissed on the 19th of November, 1914. An application was made to the Munsif of Jaunpur by the Government Pleader for sanction to prosecute the applicant under various sections of the Indian Penal Code, these being some of the sections mentioned in section 195 of the Code of Criminal Procedure. The application purported to be one under section 195, paragraph (1), clause (b), of the Code of Criminal Procedure. It was not an

* Civil Revision No. 108 of 1917.

(1) (1916) 32 Indian Cases, 157.

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application under section 476, as was stated in the order of the Munsif. The matter was taken up by the successor in office of the Munsif who had dismissed the suit. He took some additional evidence and came to the conclusion that there was not sufficient reason for sanctioning the prosecution of the present applicant, and he accordingly rejected the application. Thereupon a petition was presented in the Court of the Sessions and Subordinate Judge of Jaunpur, purporting to be an application under section 195, paragraph (6), of the Code of Criminal Procedure. Mention was made in the application of the fact that the Munsif had refused sanction, and the prayer was that sanction might be granted for the prosecution of the present applicant. The Sessions and Subordinate Judge of Jaunpur, who was Subordinate Judge of Jaunpur as regards civil matters and Additional Sessions Judge as regards criminal cases, took some further evidence and came to the conclusion that there was a *prima facie* case against the present applicant. He accordingly granted the sanction asked for.

Against this order the person against whom sanction to prosecute was granted applied in revision to the High Court.

Mr. C. Ross Alston and Mr. E. A. Howard, for the applicant.
 Mr. G. P. Boys, for the opposite party.

BANERJI, J.—This application for revision was made under the following circumstances. A suit was filed in the court of the Munsif of Jaunpur which was dismissed on the 19th of November, 1914. An application was made to the Munsif of Jaunpur by the Government Pleader for sanction to prosecute the applicant under various sections of the Indian Penal Code, these being some of the sections mentioned in section 195 of the Code of Criminal Procedure. The application purported to be one under section 195, paragraph (1), clause (b), of the Code of Criminal Procedure. It was not an application under section 476, as is erroneously stated in the order of the learned Munsif. The matter was taken up by the successor in office of the Munsif who had dismissed the suit. He took some additional evidence and came to the conclusion that there was not sufficient reason for sanctioning the prosecution of the present applicant, and he accordingly rejected the application. Thereupon a petition was presented in the court of

the Sessions and Subordinate Judge of Jaunpur, purporting to be an application under section 195, paragraph (6), of the Code of Criminal Procedure. Mention was made in the application of the fact that the Munsif had refused sanction and the prayer was that sanction might be granted for the prosecution of the present applicant. I may mention that the officer called Sessions and Subordinate Judge of Jaunpur is Subordinate Judge of Jaunpur as regards civil matters and Additional Sessions Judge as regards criminal cases. He took some further evidence and came to the conclusion that there was a *prima facie* case against the present applicant and accordingly granted the sanction asked for. It is this order of which revision is sought, and the main arguments upon which the application for revision is founded are that the court below had no jurisdiction to grant the sanction asked for, and that on the merits its order was not a proper one. It is clear from the provisions of section 195 of the Code of Criminal Procedure that an original application for sanction may be made under clause (b) of sub-section (1) of that section either to the court in which the proceedings in connection with which the alleged offence is said to have been committed were held, or to some other court to which that court is subordinate. Under paragraph (6) any sanction given or refused may be revoked or granted by any authority to which the authority giving or refusing sanction is subordinate. If, therefore, the Munsif of Jaunpur was subordinate to the Subordinate Judge of Jaunpur, within the meaning of section 195 of the Code of Criminal Procedure, an original application for sanction could be made to that officer, or that officer could be moved to grant the sanction which had been refused by the Munsif. It is, therefore, immaterial whether the application made to the Sessions and Subordinate Judge of Jaunpur was an original application under clause (b) of paragraph (1) or an application under paragraph (6) of section 195. The real point for consideration is whether the Munsif of Jaunpur is to be deemed to be subordinate to the Subordinate Judge. Paragraph (7) of the section provides that for the purposes of the section every court shall be deemed to be subordinate to the court to which appeals from the former court ordinarily lie. As I have stated above, the position of the Subordinate Judge of Jaunpur is somewhat

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different from the position of ordinary Subordinate Judges; he is Additional Sessions Judge and he is Subordinate Judge for civil cases. Under orders issued by the High Court under section 21 (4) of the Bengal, Agra, and Assam Civil Courts Act, 1887, (vide notification no. 1708/15-114, dated the 25th April, 1913) appeals from the court of the Munsif of Jaunpur are preferred to his court and "ordinarily lie" to his court. Therefore the Subordinate Judge must be deemed to be the authority to which the Munsif of Jaunpur is subordinate within the meaning of section 195, and he was competent to entertain the application made to him, whether that application be regarded as one under paragraph (6) or as an original application under clause (b) of paragraph (1). As to the merits of the case, the Subordinate Judge was, I think, competent to take and consider additional evidence for the purpose of satisfying himself whether sanction should or should not be granted. This is the view which was taken by a learned Judge of this Court in *Rahmatullah v. The Emperor* (1). The learned Judge of the court below has not, it is true, set forth at length the reasons for the conclusion at which he arrived, but having regard to the additional evidence, which was produced before the Munsif and also before the Subordinate Judge, it cannot be said that there was no *prima facie* case against the applicant. I am therefore of opinion that the present application is without force and I accordingly reject it. The order staying proceedings is discharged and it is directed that the record be sent back to the court below.

Application rejected.

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 August, 18.

Before Mr. Justice Piggott.

EMPEROR v. GANGA RAM.*

Criminal Procedure Code, section 476—Jurisdiction—Order for prosecution of persons not parties to a proceeding before the Court.

A court in taking action under section 476 of the Code of Criminal Procedure is not restricted, as regards the person against whom an order may be made, to the parties to a proceeding pending before it. *Jadu Nandan Singh v. Emperor* (2) dissented from.

THE facts of this case were as follows:—

There was a litigation going on in the court of the Munsif of Bisauli, in which one of the parties was seeking to establish the

* Civil Revision No. 88 of 1917.

(1) (1916) 32 Indian Cases, 157. (2) (1909) I. L. R., 37 Cal., 250.

proposition that a certain house had at one time belonged to one Ganga Ram. As a piece of evidence bearing on this question, he undertook to prove to the court that Ganga Ram had granted a ten years' lease of this house in favour of one Tulshi Ram, since deceased. It was said that Tulshi Ram had executed on stamp paper an agreement to hold this house as tenant of Ganga Ram at a certain rent. A summons was issued to Ganga Ram, calling upon him to produce this document. He appeared in court in obedience to this summons, tendered in evidence an agreement of the nature suggested, purporting to have been executed in his favour by Tulshi Ram, deceased, as long ago as the year 1895. He gave evidence on oath supporting the story of the lease in question and the genuineness of the document. A marginal witness to the said document, named Nathu Lal, was also called and examined by the court, and he gave evidence in support of the genuineness of the document. The Munsif came to the conclusion that the document in question was a forgery; that there never had been any such contract of lease; that it was proved by evidence that Tulshi Ram had never occupied the premises in question; that the appearance of the document was in itself suspicious, and that, if the transaction had been a genuine one, the document would have been registered, which it was not. He issued notice to Ganga Ram and Nathu Lal, as well as to two other persons to show cause why their prosecution should not be ordered under the provisions of section 476 of the Code of Criminal Procedure, and in the result he ordered the prosecution of Ganga Ram in respect of offences punishable under sections 193 and 471 of the Indian Penal Code and of Nathu Lal in respect of offences under sections 193 and 471/109 of the same Code.

Against these orders both Ganga Ram and Nathu Lal applied in revision to the High Court.

Babu *Satya Chandra Mukerji* and Munshi *Panna Lal*, for the applicant.

Mr. *W. Wallach*, for the opposite party.

PIGGOTT, J.—These are two applications which come before the Court under the following circumstances. There was a litigation going on in the Court of the Munsif of Bisauli, in which one of the

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parties was seeking to establish the proposition that a certain house had at one time belonged to one Ganga Ram. As a piece of evidence bearing on this question, he undertook to prove to the court that Ganga Ram had granted a ten years' lease of this house in favour of one Tulshi Ram, since deceased. It was said that Tulshi Ram had executed on stamp paper an agreement to hold this house as tenant of Ganga Ram at a certain rent. Summons was issued to Ganga Ram calling upon him to produce this document. He appeared in court in obedience to the summons, tendered in evidence an agreement of the nature suggested, purporting to have been executed in his favour by Tulshi Ram, deceased, as long ago as the year 1895. He gave evidence on oath supporting the story of the lease in question and the genuineness of the document. A marginal witness to the said document, named Nathu Lal, was also called and examined by the court, and he gave evidence in support of the genuineness of the document. The learned Munsif came to the conclusion that the document in question was a forgery; that there never had been any such contract of lease; that it was proved by evidence that Tulshi Ram had never occupied the premises in question; that the appearance of the document was in itself suspicious, and that, if the transaction had been a genuine one, the document would have been registered, which it was not. He issued notice to Ganga Ram and Nathu Lal, as well as to two other persons, with whose cases I am not now concerned, to show cause why their prosecution should not be ordered under the provisions of section 476 of the Code of Criminal Procedure, and in the result he has ordered the prosecution of Ganga Ram in respect of offences punishable under sections 193 and 471 of the Indian Penal Code and of Nathu Lal in respect of offences under sections 193 and 471/109 of the same Code. The applications before me are in revision by Ganga Ram and by Nathu Lal against the said order. The principal point taken is that the provisions of section 476 of the Code of Criminal Procedure must be regarded as governed by those of section 195 of the same Code, in such a manner that an offence, for instance, of using as genuine a forged document, punishable under section 471 of the Indian Penal Code, would not fall within the purview of section 476 unless it had been committed

by a party to the proceeding pending before the court at the time when the offence in question was brought under the notice of that court. There is authority for that proposition in the case of *Jadu Nandan Singh v. Emperor* (1). I am informed that there has been a decision of the Madras High Court to the same effect and one of the Bombay High Court to a contrary effect. With all respects to the learned Judges who have taken a different view, I have little doubt that the provisions of section 476 of the Criminal Procedure Code are complete as they stand, and that it is sufficient to bring those provisions into operation if the offence in question be one of the kind referred to in section 195 of the Criminal Procedure Code and if it be either committed before the court which takes action under section 476, or brought under the notice of that court in the course of a judicial proceeding. So far as the cases now before me are concerned, however, this is of purely academical interest. The learned Munsif was of opinion that Ganga Ram and Nathu Lal had intentionally given false evidence before him in the course of a judicial proceeding and he was entitled to direct their prosecution for the said offence. He saw reason to suspect that these two men had also committed some further offence punishable under section 471 of the Indian Penal Code, or had abetted the commission of some such offence, in connection with the document about which they gave evidence. Now as Ganga Ram and Nathu Lal were not parties to the suit pending in the court of the Munsif when this document was produced in evidence, there is nothing in the provisions of section 195 of the Code of Criminal Procedure to prevent the Magistrate from taking cognizance of the alleged commission by either of these men of the offences above referred to, if he finds upon inquiry that the evidence laid before him discloses the commission of such offence or offences. That portion therefore of the order of the learned Munsif which directed the prosecution of these two men in respect of an offence under section 471 or 471/109 of the Indian Penal Code was really superfluous.

I have been asked further to consider the question whether the facts disclosed by the order of the learned Munsif are

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(1) (1909) I. L. R., 37 Cal., 250.

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sufficient to warrant the conclusion that Ganga Ram, when he produced this document in court in obedience to a summons, was fraudulently or dishonestly using that document within the meaning of section 471 of the Indian Penal Code. I think it sufficient to say that this is a point which will require careful consideration by the trying Magistrate, and the decision of which may depend on the nature of the evidence produced by the prosecution. One possible view of the case is that, whatever offence punishable under section 471 of the Indian Penal Code was committed in the present case, was committed by that party to the suit who caused the production of this document by obtaining the issue of process against Ganga Ram, and that the matter to be considered by the trying Magistrate will be whether there is reason to suppose that Ganga Ram or Nathu Lal, or either of them, abetted the commission of that offence. Further than this it is impossible for me to deal with the point on the facts now before me. I find no reason in law for holding that the orders complained of were outside the jurisdiction of the court below and in my opinion they were well within the discretion of that court and call for no interference. I dismiss both these applications with costs. The learned Government Advocate who has appeared to oppose the applications will be entitled to charge as costs the fee actually received by him.

Applications dismissed.

REVISIONAL CRIMINAL.

Before Justice Sir Pramada Chavan Banerji.

EMPEROR v. MADHO AND ANOTHER.*

1917,
 August, 13.

Act No. XLV of 1860 (Indian Penal Code), sections 332, 323—Criminal Procedure Code, section 144—Public servant in execution of his duty as such—Police constable assaulted whilst attempting to enforce an order which in fact had become obsolete.

A police constable was assaulted whilst endeavouring to enforce an order passed by the District Magistrate as to the carrying of *lathis* by *Pragwals*, which order, if originally lawful, had in any case become obsolete.

Held that in the circumstances the persons who assaulted the constable could not be convicted under section 332 of the Indian Penal Code, but

* Criminal Revision No. 576 of 1917, from an order of F. D. Simpson, Sessions Judge of Allahabad, dated the 16th of June, 1917.

they were liable to conviction under section 328. *Queen-Empress v. Dalip* (1) referred to.

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THE facts of the case are as follows:—

The applicants, servants of a Pragwal, were returning to their homes across the river Ganges near Allahabad and had reached the pontoon bridge, when they were asked by a police constable to give up their *lathis*, which they were carrying, or accompany him to the *thana*. The applicants refused to do either, and the constable then said that he would not allow them to proceed any further. Thereupon the accused struck the constable and there was a fight. On these facts they were convicted of an offence under section 332, Indian Penal Code, and sentenced to nine months' rigorous imprisonment and directed to execute bonds under section 106, Criminal Procedure Code. The conviction and sentence were affirmed on appeal.

They applied in revision to the High Court.

Babu *Piari Lal Banerji*, for the applicant:—

The action of the constable was not justified by law. The order of the District Magistrate prohibiting Pragwals and their servants from carrying *lathis* in the city was passed in December, 1914, and could only have been passed under section 144, Criminal Procedure Code, and became inoperative after the expiry of two months. (Vide paragraph 5 of the section.) There was therefore no legal order in existence which would justify the action of the constable. He was not therefore acting in the discharge of his duty and the conviction under section 332, Indian Penal Code, was bad in law. In order to justify a conviction under that section the public officer must be performing an act which is legal. It is not enough for him to plead that he was acting *bona fide* under colour of his office. I rely on the following cases: *Emperor v. Mukhtar Ahmad* (2), *Queen-Empress v. Dalip* (1) and *Emperor v. Krishna Lal* (3).

The Government Pleader (Babu *Lalit Mohan Banerji*), for the Crown:—

In this case the police constable was merely obeying the orders of his superior, the District Magistrate. He could not question

(1) (1896) I. L. R., 18 All., 246. (2) (1915) I. L. R., 37 All., 353.

(3) (1916) I. L. R., 39 All., 131.

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or discuss the legality or propriety of the order. He was therefore acting in the discharge of his duties under section 23 of the Police Act (V of 1861); he would be liable to punishment if he did not carry out the orders of the District Magistrate; *Queen-Empress v Nand Kishore* (1).

Babu *Piari Lal Banerji* was heard in reply on the question of the conviction and sentence under section 323, Indian Penal Code.

BANERJI, J.—The two applicants, Madho and Ramanand, have been convicted under section 332 of the Indian Penal Code for having caused simple hurt to a constable named Ram Partit and each of them has been sentenced to nine months' rigorous imprisonment. They have also been bound down to keep the peace for one year under section 106 of the Code of Criminal Procedure. The facts as found are these. The two men, with a third man named Mataphal, were returning from the Cantonment Magistrate's court and when they were nearing the pontoon bridge the constable, Ram Partit, who was on duty, found that they were all armed with what the Magistrate calls formidable *lathis*. The constable inquired who they were and on being told that they were servants of a Pragwal he asked them to give up their *lathis* if they were not prepared to go to the *thana*. The men refused to surrender their *lathis*. The constable then told them that he would not allow them to proceed. Thereupon Madho attacked him with a *lathi* and struck him several times. Ram Partit rushed at Madho and seized him by the waist and the two grappled with each other. Ramanand then struck Ram Partit with his fists until another constable appeared on the scene. For this offence the two applicants have been convicted and sentenced as stated above.

It is contended that the conviction under section 332 of the Indian Penal Code is illegal, inasmuch as the constable, Ram Partit, who was undoubtedly a public servant, was not in the discharge of his duty as such public servant when hurt was caused to him. It appears that in August, 1914, the District Magistrate of Allahabad issued an order (which appears to have been published in December, 1914), to the effect that no Pragwals or their

(1) Weekly Notes, 1896, p. 1.

servants should carry *lathis* within the municipal limits of Allahabad or the cantonment or the river side, and that the police had instructions to seize any *lathis* or *dandas* found in the possession of Pragwals or their servants. It is in pursuance of this order that the constable is said to have been acting. If the order was a legal order and was in force at the time when the occurrence in the present case took place the applicants have been rightly convicted. The only authority, as far as I am aware (and I have not been referred to any other) under which the order could legally have been passed is paragraph 3 of section 144 of the Code of Criminal Procedure, being an order issued to the public generally and not to any individual. Under paragraph 5 of the same section no order passed under the section shall remain in force for more than two months from the making thereof, unless in certain cases the Local Government by notification in the official Gazette otherwise directs. If the order in the present case was made under section 144, it ceased to have operation after the expiry of two months from the date of it. It has not been stated or shown on behalf of the Crown that this order was repeated at any subsequent time, and therefore I must take it that it had ceased to have force at the time when the offence in the present case was committed. In the case of *Queen-Empress v. Dalip* (1), which was in some respects similar to the present case, it was held that the words "in the discharge of his duty as such public servant" in section 332 of the Indian Penal Code mean in the discharge of a duty imposed by law on such public servant in the particular case. If the order issued by the District Magistrate in August, 1914, ceased to have effect after the expiry of two months from the date of issue the constable in carrying out the order could not be said to have been acting in the discharge of a duty imposed by law on him. The learned Government Pleader has referred to section 23 of the Police Act (No. V of 1861) and has contended that it was the duty of the constable to obey and carry out the order issued by the District Magistrate, no matter whether that order was justified by law or not. The answer to this is afforded by the language of section 23 itself which provides that it shall be the duty of every police officer promptly to obey

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and execute all orders and warrants *lawfully* issued to him by any competent authority. The word "lawfully" governs both "orders" and "warrants," so that an order which a subordinate police officer is bound to obey must be an order which was lawfully issued. If the order passed by the District Magistrate could not be lawfully issued by him, it was not the duty of the constable to obey that order. Therefore when he was carrying out that order he cannot be said to have been discharging his duty as a public servant. The case of *Queen-Empress v. Nand Kishore* (1) was referred to, but the case seems to be distinguishable. In my opinion the constable in calling upon the accused to surrender their *lathis* was not acting in the discharge of his duty as a public servant, and therefore the accused could not be legally convicted under section 332, Indian Penal Code. They were certainly guilty of causing simple hurt and were liable to conviction under section 323 of the Indian Penal Code. Having regard to the character of the men who committed the assault on the constable and the necessity of having proper control over men of this class, especially when they commit assaults on police constables, who are entitled to protection, I think that a somewhat severe sentence was called for. The sentence of nine months' rigorous imprisonment is, however, unduly severe for a simple assault of this kind. I therefore alter the conviction from one under section 332 to one under section 323 of the Indian Penal Code and reduce the sentence to one of four months' rigorous imprisonment. The order passed under section 106 of the Code of Criminal Procedure binding down the applicants to keep the peace will stand. The applicants must surrender to their bail and serve out the remainder of their sentences.

Conviction altered.

Before Justice Sir Pramada Charan Banarji.

EMPEROR v. BABU PRASAD AND ANOTHER*

1917
September,
22.

Criminal Procedure Code, section 478—Procedure—Commitment made by Munsif without following the procedure laid down in the section—Commitment quashed.

A Munsif holding an inquiry under the latter portion of section 478 of the Code of Criminal Procedure with a view to making a commitment to the

* Criminal Reference No. 709 of 1917.

(1) Weekly Notes, 1896, p. 1.

Court of Session is bound to follow substantially the provisions of chapter XVIII of the Code.

Where in such circumstances the Munsif neither examined the witnesses in the presence of the accused nor explained the charge to them, the commitment was quashed as being bad in law.

THE facts of this case are fully set forth in the following order of reference under section 438 of the Code of Criminal Procedure made by the Sessions Judge of Moradabad.

"In this case two persons have been committed to this Court by Pandit Rup Kishan Agha, Munsif of Chandausi. One is Babu Prasad, who is charged with offences under sections 196, 471 and 467 of the Indian Penal Code, while the other is Chandar Sen, who is charged with an offence under section 467 of the Indian Penal Code. The Munsif seems to have acted under section 478 of the Criminal Procedure Code, but he has not followed the proper procedure as laid down in that section.

"It appears that Babu Prasad, who was the defendant in a Small Cause Court suit, pleaded satisfaction and filed a receipt in support of the alleged satisfaction. In order to prove his plea he himself gave evidence and examined Chandar Sen, the scribe of the receipt. The Munsif came to the conclusion that the receipt was forged. He accordingly took action under section 476 of the Criminal Procedure Code, and on the 31st of May, 1917, passed an order to that effect and fixed the 18th of June for inquiry. Babu Prasad, who was apparently present, was informed of this order and notice was issued to Chandar Sen calling upon him to show cause why he should not be committed.

"On the 18th of June Babu Prasad filed a written statement, but Chandar Sen was absent. A fresh notice was ordered to be issued to him for the 3rd of July, after statements of one Baldeo Sarup, Mukhtar, and Babu Prasad (both on oath) had been recorded. On the 3rd of July Chandar Sen filed a written statement. Some copies were put in on behalf of Ram Kishan Das (plaintiff) and the inquiry was adjourned to the 4th of July. On the 14th of July, some records were perused and the inquiry was adjourned to the 17th of July. On the 17th of July the Munsif decided to commit the accused under section 478 of the Criminal Procedure Code, instead of sending them to a Magistrate

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accused was not a public servant, held that section not applicable but convicted the accused under section 193, Indian Penal Code of having fabricated false evidence as defined by section 192 Indian Penal Code. The conviction and sentence were upheld by the Sessions Judge. The accused applied in revision to the High Court.

Babu Piari Lal Banerji, for the applicant :—

Upon the facts found, no offence of fabricating false evidence was committed. The sub-inspector was investigating a case of suspected stolen property and the question he had to decide was whether the cattle were stolen property or not. It has now been found that the cattle were not stolen property and were really sold in the market on 21st March, 1917, therefore the receipts could not possibly induce him to form an erroneous opinion. They would, on the contrary, help him in arriving at a true opinion. There was nothing dishonest in the action of the accused. He had forgotten to issue receipts on the date of sale and when it was represented to him that the cattle-dealers were in trouble on account of his carelessness, he issued the receipts and put upon them the date of sale of the cattle.

Mr. C. J. A. Hoskins (for the Assistant Government Advocate), for the Crown :—

It is quite clear that the accused must have been paid something to induce him to grant the receipts and his action was dishonest. The receipts would influence the opinion of the sub-inspector and the act amounted to fabricating false evidence.

BANERJI, J.—The applicant Badri Prasad has been convicted of fabricating false evidence as defined in section 192 of the Indian Penal Code and has been sentenced under section 193 of that Code to three months' rigorous imprisonment. Badri Prasad was a clerk employed by the Naraini Estate, which is in charge of the Court of Wards, and one of his duties was to register sales of cattle at the Naraini market. On the 21st of March, 1917, two persons, Riyayat and Arman, were carrying away twenty-six head of cattle. While they were passing Bisenda police station the sub-inspector stopped them and wanted them to produce the receipts which they had obtained as

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to the registration of the date of the sale of the cattle. They produced 19 receipts, but they had none as regards the remaining seven head of cattle. On the 27th of that month, they produced seven receipts bearing date the 21st of March, 1917. These receipts had in fact been prepared by the accused on the 27th, but they were dated, as I have said above, the 21st of March. It has been proved that the seven head of cattle were in fact purchased by Riyayat and Arman on the 21st of March at the market, but, for some reason which does not appear, probably through oversight, receipts were not granted in regard to them. The accused was sent up for trial for an offence under section 218 of the Indian Penal Code. But as he was not a public servant he could not be convicted under this section. The learned Magistrate, however, convicted him under section 193, he being of opinion that in preparing the seven receipts Badri Prasad had fabricated false evidence. The offence of fabricating false evidence is defined in section 192. The ingredients of the offence are, that circumstances should be caused to exist, or a false entry should be made in any book or record, or any document containing a false statement; that such circumstances, false entry or false document should be made with the intention that it may appear in evidence in a proceeding taken by law before a public servant, and so appearing in evidence may cause such public servant to entertain an erroneous opinion touching any point material to the result of the proceeding. The proceeding which the sub-inspector, who is a public servant, was holding was one for the purpose of ascertaining whether the cattle had been purchased at the market by the two men who were carrying them or whether they were stolen property. The receipts which were granted by the accused to the purchasers of the cattle could not possibly cause the sub-inspector to entertain an erroneous opinion touching a point material to the result of the inquiry he was making. He was satisfying himself whether the cattle were stolen property and these receipts, so far from causing him to entertain an erroneous opinion as to whether the cattle had been sold or not, might have caused him to form a correct opinion on the point. One of the principal ingredients of the offence of fabricating false

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evidence was therefore wanting in this case. This being so, the offence of fabricating false evidence was not committed by the accused and he could not be criminally punished under section 193 of the Indian Penal Code. His conduct in granting receipts subsequently to the date of the actual sale or in making alterations in his register was no doubt reprehensible, but it did not constitute a criminal offence for which he could be convicted. I accordingly allow the application, set aside the conviction and the sentence, and acquit Badri Prasad of the offence of which he was convicted. The bail-bond furnished by him is cancelled.

Application allowed.

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Before Justice Sir Pramada Chandra Banerji.

EMPEROR v BARKAT ALI AND ANOTHER.*

Act No. VII of 1878 (Indian Forest Act), section 25(2)—Hunting without a permit in a reserved forest

Four persons made up a party and went, without having a permit, to shoot in a reserved forest. Two of the party shot deer, the other two shot nothing. *Held* that the two members of the party who had not shot anything could properly be convicted of hunting in a reserved forest within the meaning of section 25 (2) of the Indian Forest Act, 1878.

FOUR persons went together, without having obtained the necessary permit to shoot in a reserved forest. Two of the party shot two deer; the other two shot nothing. All four were tried for and convicted of an offence under section 25, clause (2), of the Indian Forest Act; the two persons who had shot nothing, and who had been fined Rs. 50 and Rs. 40, applied in revision to the High Court.

Babu Satya Chandra Mukerji, for the applicants.

The Assistant Government Advocate (Mr. R. Malcomson), for the Crown.

BANERJI, J.—The applicants Barkat Ali and Hamid Ali have been convicted under section 25 of the Forests Act (No. VII of 1878). The former has been sentenced to a fine of Rs. 50 and the latter to a fine of Rs. 40. It appears that these two persons along with two others went to a reserved forest. The other two persons who were tried along with the applicants Barkat Ali and

*Criminal Revision No. 701 of 1917, from an order of W. R. G. Mait, Sessions Judge of Gorakhpur, dated the 11th of July, 1917.

Hamid Ali shot two deer. For this all the four persons were placed on their trial. It has been found that the four persons formed a party and went to the forest with the object of hunting. They had no permit and therefore they were punishable under the section mentioned above for violating the rules framed under clause (i) of the section. It is true that the two applicants did not actually shoot any deer. As the section makes shooting punishable, they could not be convicted of shooting in a reserved forest; but they were certainly hunting, and hunting without a permit is punishable under the section. Therefore the two applicants have, in my opinion, been rightly convicted. The sentences, however, seem to be severe. I reduce the sentence in the case of Barkat Ali to a fine of Rs. 25 and in the case of Hamid Ali to one of Rs. 20. Any sum paid in excess of the above amounts will be refunded.

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Conviction upheld.

Before Justice Sir Pramada Chavan Banerji

EMPEROR v. RAM KISHAN*

Criminal Procedure Code, sections 110, 123—Security for good behaviour—Security furnished—Record not required to be sent to the Sessions Judge for orders

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Under section 123, clause (2), of the Code of Criminal Procedure it is only necessary to lay the proceedings before the Sessions Judge or the High Court when security has not been given, not when it has been given. *Ras Isra Pershad v. Queen Empress* (1) referred to.

IN this case one Ram Kishan was ordered by the officiating District Magistrate of Bareilly to give security to be of good behaviour for a period of two years. The security was furnished. Ram Kishan then applied in revision to the High Court, urging, *inter alia*, that the Magistrate should have sent the proceedings under section 123 (2) to the Sessions Judge for confirmation.

Mr. C. J. A. Hoskins, for the applicant.

The Assistant Government Advocate (Mr. R. Malcomson), for the Crown.

BANERJI, J.—Ram Kishan was called upon under section 110 of the Code of Criminal Procedure to furnish security for good

* Criminal Revision, No. 674 of 1917, from an order of R. W. Bigg-Wither, Officiating District Magistrate of Bareilly, dated the 23rd of June, 1917.

(1) (1895) I. L. R., 23 Cal., 621.

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behaviour on the ground that he was a man of a dangerous and desperate character. The officiating District Magistrate of Bareilly, who tried the case, made an order under section 118 directing Ram Kishan to furnish security to be of good behaviour for two years. As the security was furnished he did not submit the case to the Sessions Judge under section 123 of the Code. The first plea taken in the application for revision to this Court is that the learned Magistrate acted contrary to law in not complying with the provisions of section 123, sub-section (2), and not sending the record for the orders of the Sessions Judge. Having regard to the clear language of section 123, which is to the effect that if a person who has been ordered to furnish security does not give such security, the Court may direct him to be detained in prison pending the orders of the Sessions Judge. The learned counsel for the applicant did not press the plea. In the case of *Rai Isri Pershad v. Queen-Empress*(1), it was observed that the section has reference to a case where default is made in furnishing the security required, and that if security is given, the section does not apply and no reference to the Court of Session is necessary. Security having been furnished in this case, it was not necessary to submit the case to the Sessions Judge. As the order in the present case was made by the officiating District Magistrate, I have allowed the whole of the evidence to be laid before me by the learned counsel for the applicant. In view of that evidence, which shows that there are specific instances in which the accused had been maltreating people in trying to extort money and had been extorting money, it cannot be held that he has retrieved his character. He had already been convicted six times, and it is not satisfactorily shown that since his last conviction in 1914 he has improved his character. On the contrary, the evidence goes to prove that he is still pursuing his old habits. Under these circumstances I feel that I should not be justified in interfering with the order of the Court below. I accordingly dismiss the application.

Application dismissed.

(1) (1895) I. L. R., 23 Cal., 621 (627).

Befo e Justice Si Pramada Cha an Danejji.
EMPEROR v. THAKUR DAS AND OTHERS*.

1917
October, 1.

Act No. XLV of 1860 (Indian Penal Code), section 120B—Criminal Procedure Code, section 196A—Conspiracy—Autho, ity for prosecution fo conspiracy—Complaint.

Section 196A of the Criminal Procedure Code provides that no Court shall take cognizance of the offence of criminal conspiracy punishable under section 120B of the Indian Penal Code "in a case where the object of the conspiracy is to commit any non-cognizable offence, or a cognizable offence not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards unless the Local Government, or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the Local Government has, by order in writing, consented to the initiation of the proceedings." *Held* that the words "not punishable with death, etc.," relate only to the term "cognizable offence."

Three persons presented a petition to the Magistrate and Collector of a district stating that a tahsildar was guilty of various offences under the Indian Penal Code, the principal offence being one under section 161.

The Magistrate treated the petition as a complaint; took the evidence of the person presenting it, and finally dismissed it under section 203 of the Code of Criminal Procedure and gave sanction for the prosecution of the persons responsible for the petition. *Held* that the Magistrate's procedure was not open to objection.

THE facts of this case were as follows :—

On the 2nd of November, 1916, the applicant Daryao Singh presented a petition in the court of Mr. Dampier, who was both Magistrate and Collector of Muttra, in which he made various allegations against the tahsildar of Mat. These allegations, if true, would constitute offences under various sections of the Indian Penal Code, the principal offence being one under section 161. Mr. Dampier treated the application as a complaint under the Code of Criminal Procedure and recorded the statement of Daryao Singh on oath. In that statement he made specific allegations of bribery and extortion against the tahsildar. The learned District Magistrate directed an inquiry under section 203 of the Code of Criminal Procedure, and in the end dismissed the case under section 203 of the Code. He then caused further inquiry to be held and finally sanctioned the prosecution of the three applicants under the sections mentioned above. They were tried and convicted under section 120B (1) read with

*Criminal Revision No. 726 of 1917, from an order of R. D. MacLeod, Sessions Judge of Muttra, dated the 20th of August, 1917.

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section 211 of the Indian Penal Code. The accused appealed to the Sessions Judge, who dismissed their appeal. They thereupon applied in revision to the High Court.

Mr. C. Ross Alston, Mr. A. H. C. Hamilton, Mr. J. M. Banerji, and Babu Satya Chandra Mukerji, for the applicants.

The Assistant Government Advocate (Mr. R. Malcomson), for the Crown.

BANERJI, J.—The three applicants have been convicted under section 120B (1), read with section 211 of the Indian Penal Code. Their convictions have been upheld by the learned Sessions Judge. The facts of the case are fully set forth in the judgement of the learned Sessions Judge. They are briefly these: on the 2nd of November, 1916, the applicant Daryao Singh presented a petition in the court of Mr. Dampier, who was both Magistrate and Collector of Muttra, in which he made various allegations against the tahsildar of Mat. These allegations, if true, would constitute offences under various sections of the Indian Penal Code, the principal offence being one under section 161. Mr. Dampier treated the application as a complaint under the Code of Criminal Procedure and recorded the statement of Daryao Singh on oath. In that statement he made specific allegations of bribery and extortion against the tahsildar. The learned District Magistrate directed an inquiry under section 202 of the Code of Criminal Procedure, and in the end dismissed the case under section 203 of the Code. He then caused further inquiry to be held and finally sanctioned the prosecution of the three applicants under the sections mentioned above. They have been tried and convicted. The first contention raised on their behalf is that the sanction granted by Mr. Dampier as District Magistrate was illegal. I do not agree with the contention. Section 196A of the Code of Criminal Procedure provides that no court shall take cognizance of the offence of criminal conspiracy punishable under section 120B of the Indian Penal Code “in a case where the object of the conspiracy is to commit any non-cognizable offence or a cognizable offence not punishable with death, transportation, or rigorous imprisonment for a term of two years or upwards, unless the Local Government or a Chief

Presidency Magistrate or District Magistrate empowered in this behalf by the Local Government has, by order in writing, consented to the initiation of the proceedings." In these provinces the Local Government has made an order empowering District Magistrates to sanction prosecutions under this section. The contention on behalf of the applicants is that the words "not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards" govern not only a cognizable offence but a non-cognizable offence also. Having regard to the context of the section I do not think that it is open to that construction. As pointed out by the learned Sessions Judge, the use of the word "any" before non-cognizable offence shows that the Legislature did not intend that both in the case of a non-cognizable offence and a cognizable offence the proviso about their not being punishable with death, transportation, or rigorous imprisonment for a term of two years or upwards would apply. If that had been the intention of the Legislature, it was wholly unnecessary to make any mention of cognizable or non-cognizable offences. What the Legislature intended apparently was that in the case of a non-cognizable offence the District Magistrate empowered under the section would have the authority to sanction prosecution, but in the case of cognizable offences he would have such power in respect of such offences only as are not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards. It is clear that the intention of the Legislature was to give authority to the Local Government or a Chief Presidency Magistrate or a District Magistrate who may be empowered in this behalf to sanction prosecutions in the case of minor offences only; but it may be that in making this provision the Legislature overlooked the fact that there are non-cognizable offences which are punishable with imprisonment for a term of two years or upwards. However, as the section stands, I do not think it is open to any other construction than that placed on it by the

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and for the purposes of a departmental inquiry. It is true that the petition was not headed as a petition presented to the District Magistrate, but the allegations made in it were to the effect that the tahsildar had committed specific offences, and in the statement which was made by Daryao Singh before Mr. Tampier he gave specific instances of them. His object clearly was that action should be taken under the Code of Criminal Procedure against the tahsildar. The application was therefore a complaint. The Magistrate treated it as such. He ordered an inquiry under section 202, and finally made an order under section 203. That Daryao Singh's object was that the petition was to be treated as a complaint further appears from the petition sent by him to the Commissioner on the 23rd of December, 1916, as set forth in the judgement of the Court below. Although it does not appear from the petition originally filed before Mr. Dampier whether it was filed before him in his capacity of Magistrate or in his capacity of Collector, the subsequent proceedings which took place and the conduct of Daryao Singh himself show that he intended it to be a complaint and that it was in fact a complaint against the tahsildar.

As regards the merits of the case they have been dealt with by the learned Sessions Judge, and I see no reason to differ from his conclusion. As regards Daryao Singh he is, as both the Courts below have held, only a tool in the hands of the other accused. He was, therefore, not liable to the same amount of punishment as that inflicted on the others. In his case I reduce the sentence to one of three months' rigorous imprisonment. The applications of the other two applicants are dismissed. The applicants must surrender to their bail to serve out the remainder of their sentence.

Application rejected.

APPELLATE CIVIL.

Before Mr. Justice Figgott and Mr. Justice Walsh.

F B POWELL (OPPOSITE PARTY) v S. SEN AND OTHERS (APPLICANTS)*.

Company—Winding up—Contributory—Application for allotment of shares made by alleged contributory under conditions which were not carried out by the Company.

1917
June, 16.

A, who was the holder of fifty shares in a limited liability Company, entered into an agreement with the Company through its managing director to take 150 more shares, on the conditions (a) that he was to be appointed a "terminal director" of the Company and (b) that the business of the Company was to be transferred from Meerut, where it had been formed, to Saharanpur. The 150 shares were allotted to A, but he never paid the allotment money, and, though the business of the Company was, nominally at least, transferred to Saharanpur, A was never appointed a director. Shortly after this allotment the Company went into liquidation.

Held that A could not be made a contributory in respect of the 150 shares which he had offered 'conditionally' to take. *The London and Provincial Provident Association, Ltd.*, in re *Mogridge* (1) referred to.

THIS was an appeal from an order made by the District Judge of Meerut allowing an application made by the liquidator of the Bharat Ice Association, Limited, Meerut, that the name of the appellant, Mr. F. B. Powell, should be placed on the list of contributories. The facts of the case are fully set forth in the judgement of the Court.

The Hon'ble Sir Sundar Lal and Dr. Surendra Nath Sen, for the appellant.

Mr. Nihal Chand, for the respondents.

FIGGOTT and WALSH, JJ. :—We think this is a clear case and that this appeal must be allowed. Mr. Powell is entitled to have his name removed from the list of contributories. The circumstances of the case are as follows.—Sometime in 1912 a company of the name of the Bharat Ice Association, Limited, began to carry on business in Meerut, where it may be supposed that under proper management it had a reasonable prospect of success. It appears to have been starved from the outset, and, although it did a considerable amount of business in the way of obtaining share-holders and its books were kept with scrupulous care, it

* First Appeal No. 89 of 1916, from an order of L. Johnston, District Judge of Meerut, dated the 14th August 1916.

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made no use. Provisions were contained in the articles of association for the appointment of directors. One only is important, namely, that with regard to what were called Terminal Directors, in other words, directors appointed for a specific period. By article 177 (e), it was provided that the qualification for holding the post of a Terminal Director should be the holding of two hundred shares in the said company. Mr. F. B. Powell, a zamindar of Saharanpur, against whom this application was made, had originally become a share-holder in the month of December, 1912, to the extent of fifty shares. The company was never in possession of sufficient working capital, and in fact was unable to take delivery of the necessary machinery to carry on the business, and was indebted for a fairly substantial loan from the Standard Bank. Under these circumstances it was clearly necessary for the company, if it was in future to carry on business, to raise further capital, and a resolution on the 2nd of February, 1913, was passed by the Board for the purpose of increasing the capital. These circumstances are important, if not vital, to a consideration of the question on which this application really turns, because they throw considerable light on the probabilities and on the conduct of both the main actors to this transaction. The managing Director was one Mr. Kapur, and we are satisfied—the evidence is really conclusive on the point—that, if he was not the sole person who did any business for the company at this time, at any rate he was appointed by the Board of Directors their agent for obtaining any further capital in pursuance of the resolution of the 2nd of February, 1913. He was expressly authorized to make such terms as he could for the extension of the credit of the company, and it is quite clear that his position was such that the company seeking to avail itself of any contract made in its interest by Mr. Kapur would be bound by the terms of such contract so long as it was not *ultra vires* of the memorandum and articles of association. He seems to have carried out his duties with industry. He secured a large number of new share-holders though for very small amounts, but substantially it may be said that the results of his efforts were of no real benefit to the company in securing them sufficient funds to transact any serious business. It was therefore essential from the point of view of

the company, to secure a substantial share-holder, and under these circumstances Mr. F. B. Powell was selected for the purpose, and eventually, as the Judge has found and as the evidence of Mr. Kapur testifies, Mr. Powell agreed to take 150 additional shares on the understanding given by Mr. Kapur that the works of the company would be removed to Saharanpur and that Mr. Powell should become a Terminal Director. There really can be no doubt as to the existence of this condition. Two features of the transaction have been pointed out in argument. In the first place when Mr. Powell applied for 150 shares, he did not send the application money. That conduct at any rate was consistent with the transaction being incomplete. He was already a share-holder to the extent of fifty shares and his application was for 150 further shares, which was exactly the qualification under article 177 (e) necessary for the appointment of a Terminal Director. It is uncertain when he paid his application money, or whether he ever paid it in full; but he did pay Rs. 62. His application was dealt with at a meeting of the Board and it was decided to allot him 150 shares the numbers of which were given. On the 17th of March, a resolution was passed which is remarkable in its terms, viz., that "as a special case 150 shares which were specified by numbers should be allotted to Mr. Powell if his application money is received in Rs. 75 only." An allotment letter was sent to him calling upon him to pay a further sum of Rs. 75 on allotment, that is to say, in addition to Rs. 75 payable on application without which an allotment could never have been made at all, such amount due on allotment being payable under the altered articles of the company, and he was given ten days to pay the allotment money. One other fact may be stated, namely, that in the case of other share-holders who had applied unconditionally for small amounts which they wanted to take in the company their names had been entered in the resolution allotting particular numbers to them without any condition at all. Nowhere was that done in the case of Mr. Powell's 150 shares. Mr. Powell never paid his allotment money. On the same day, namely, on the 17th of March, the Directors at the Board meeting resolved to call an extraordinary general meeting for the election of Mr. Powell as Terminal Director of the company, a circumstance

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is really in default for not having interested himself in the company more than he did. It is due to Mr. Powell to say that we see no ground for the view which the learned Judge has taken. Mr. Powell was under no duty, until he was appointed a Director, to take any part in the business of the company, nor indeed had he any right to do so. We think this is really a clear case. There does happen to be one authority which is remarkably like it, namely, the case of *The London and Provincial Provident Association (Limited)*, in re *Mogridge* (1). There are two circumstances in that case which in our opinion make it a stronger case in favour of the liquidator than the present case, namely, (1) that the whole of the transactions were carried out on behalf of the company only by the secretary, and (2) that the proposed share-holder really wanted to get out of his bargain because he had discovered that the company was in low water and it was a mere accident that the company sought to impose some additional terms on the original bargain. We think that the decision is a clear authority for this case according to English Law and that in this respect, the law in this country is not different.

The appeal must be allowed. Mr. Powell must have his costs in this Court and in the court below out of the estate. So far as the application of the liquidator to put Mr. Powell on the list of contributories is concerned, Mr. Powell's name must be struck off the list. Mr. Powell through his counsel has behaved very handsomely in withdrawing his claim with regard to Rs 75 and therefore we have nothing to say about that. Mr. Powell's costs are not to include any costs of serving as respondents to this appeal share-holders other than the liquidator of the company, and the Standard Bank of India must pay its own costs. The liquidator of the Bharat Ice Association, Limited, and of the Standard Bank will pay their own costs out of the respective estates of the companies they represent.

Appeal allowed

(1) [1888] 57 I. J. Ch., 932.

REVISIONAL CIVIL.

Before Mr Justice Piggott.

RAM NATH (PLAINTIFF) v. SEKHIDAR SINGH (DEFENDANT) *

1917
July, 2*Civil and Revenue Courts—Jurisdiction—Tenant taking a partner in cultivation on agreement to pay half the tenant's rent to him—Suit on such agreement by tenant against partner—Small Cause Court*

Plaintiff, being the tenant of certain plots of agricultural land on a rental of Rs. 60 a year, took the defendant into partnership on the terms that they were to cultivate jointly and divide the produce equally, and that defendant was to pay half the rent annually to the plaintiff. Held that a suit by plaintiff to recover from defendant the share of the rent payable by him was a suit for damages for breach of contract cognizable by a Court of Small Causes, and not a suit for rent within the meaning of the Agra Tenancy Act, 1901.

THE plaintiff was the tenant of certain agricultural plots. The defendant became a partner (*sharik*) in the tenancy of the plaintiff, the agreement between them being that they would jointly carry on the cultivation and divide the crops equally, and that the defendant would pay to the plaintiff Rs. 30 annually, being the half share of Rs. 60 which was the amount agreed upon between the parties as being the rent of the holding. The defendant failed to make the said payment and the plaintiff sued him in the Rent Court for it. The Rent Court held that the defendant was not a sub-tenant of the plaintiff and that it could not entertain a suit against a joint cultivator. The plaintiff brought a second suit for recovery of the amount in a Court of Small Causes. That court held that the suit was for recovery of what was essentially rent, "the nature of which could not be changed by agreement between the parties" and that accordingly the suit was not cognizable by that court. The plaintiff applied to the High Court in revision.

Babu *Jogindro Nath Mukerji*, for the applicant, stated the facts, and submitted that the suit was not between a landlord and tenant for recovery of rent. He was stopped.

Munshi *Bhagwati Shankar*, for the opposite party, contended that the suit was for 'rent,' and the relation between the parties was that of 'landlord' and 'tenant,' within the definitions of these terms in the Tenancy Act. There was no privity of contract between the the zamindar and the defendant and so the latter was

* Civil Revision No. 46 of 1917.

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not the tenant of the former. Therefore, the defendant was not the co-tenant of the plaintiff but his sub-tenant. The plaintiff rightly described him as his sub-tenant in the Rent Court, and the defendant never challenged the jurisdiction of the Rent Court to try the suit. The plaintiff should have appealed from the decision of that court. The Rent Court was the only court having jurisdiction. If it were held that the defendant was a co-tenant, even then the suit would not be cognizable by the Court of Small Causes, as it would be a suit for profits against a co-sharer in respect of agricultural land and would be cognizable only by the Revenue Courts.

Babu *Jogindro Nath Mukerji*, was not heard in reply.

PIGGOTT, J.—This was a suit for money in a Court of Small Causes. That court has refused to entertain it on the ground that it is not cognizable by that court, being a suit for rent. It presumably refers to paragraph (8) of the second schedule to the Provincial Small Cause Courts Act, No. IX of 1887. If it were a suit for rent at all it would be cognizable by a Revenue Court under the provisions of the Tenancy Act, and the Revenue Court has already refused to entertain a claim for this money, though the defendant is not to blame for this. On the plaint as drafted the claim is for damages for breach of a contract. I set aside the order of the court below and direct that court to re-admit the suit on to its file of pending cases and to dispose of it according to law. Costs here and hitherto will abide the event.

Application allowed and cause remanded.

Before Mr. Justice Piggott.

MUNIR-UD-DIN (DEFENDANT) v. SAMIR-UN-NISSA BIBI (PLAINTIFF).*

*Act No. IX of 1887 (Provincial Small Cause Courts Act), schedule II,
article 38—Suit relating to maintenance—Jurisdiction.*

Plaintiff's father-in-law left by his will certain property to plaintiff's three brothers-in-law charged with the payment of Rs. 36 per annum to the plaintiff during her life. Subsequently the brothers-in-law agreed amongst themselves to divide their liability for payment of this annuity, so that each became liable individually for the payment of Rs. 12 per annum. *Held*, on suit brought by the annuitant to recover arrears of her maintenance allowance

* Civil Revision No. 84 of 1917.

against one of her brothers-in-law, that the suit was "a suit relating to maintenance" and that the cognizance thereof by a Court of Small Causes was barred by article 38 of schedule II to the Provincial Small Cause Courts Act, 1887. *Mahadeo Rai v. Deo Narain Rai* (1) and *Masum Ali v. Mohsin Ali* (2) distinguished.

THE plaintiff's father-in-law bequeathed by his will certain property to the defendant and others and charged the property with the payment of Rs. 36 per annum to the plaintiff for her life. Subsequently the donees entered into an agreement among themselves by which they divided their liability to pay the said sum; the defendant promising, for his part, to pay to the plaintiff Rs. 12 per annum out of the Rs. 36 for her maintenance. The plaintiff brought a suit in a Court of Small Causes to recover from the defendant Rs. 36, being three years' arrears of payment due from him. The defence was (1) want of consideration entitling the plaintiff to sue, and (2) that the plaintiff had assigned no reason entitling her to relinquish the charge and seek a personal decree. The Court of Small Causes decreed the suit. The defendant applied in revision to the High Court.

Dr. S. M. Sulaiman, for the applicant:—

On the facts found the claim is for recovery of arrears of maintenance fixed by agreement. Such a suit comes within the category of "a suit relating to maintenance" specified in clause 38 of the second schedule to the Provincial Small Cause Courts Act; *Amritomoye Dasia v. Bhogiruth Chundra* (3), *Bhagvantrao v. Ganpatrao* (4), *Saminatha Ayyan v. Mangalathammal* (5) and *Baldeo Sahai v. Jumna Kunwar* (6). Secondly, the plaintiff was no party to the agreement referred to in the plaint. Therefore, unless the plaintiff chooses to enforce her claim as a charge upon the property she is not entitled to sue upon the said agreement as a mere contract; and a suit to enforce a charge is not cognizable by a Court of Small Causes.

The Hon'ble Maulvi Raza Ali, for the opposite party:—

Clause 38 of the second schedule to the Provincial Small Cause Courts Act refers to a suit which is both in form and

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substance a suit for maintenance. In the present case the plaintiff does not even mention or show that the claim was one for maintenance. The suit is for money due under the agreement; the obligation arises from the agreement, and the claim is not for maintenance as such. Clause 38 does not apply to such a suit; *Muhadeo Rai v. Deo Narain Rai* (1) and *Masum Ali v. Mohsin Ali* (2). Unless where the claim originated in a legal right to get maintenance as such, a claim to recover an annual payment is a claim for an annuity and not for 'maintenance' within the meaning of clause 38; *Saminatha Pandaram v. Kuppu Udayan* (3). Although the payment was charged upon immovable property, it was quite open to the plaintiff to give up the charge and sue for a simple money decree in a Small Cause Court. Further, the decree of the lower court is a just and proper one and no substantial injustice has been caused to the defendant. It was submitted that in such circumstances the court should not interfere in revision; *Muhammad Bakar v. Bahal Singh* (4).

PIGGOTT, J.—The plaintiff in this case is the widow of a deceased brother of the defendant. It appears that the plaintiff's husband died during the life-time of his father. The first paragraph of the plaint alleges that, under the will of their deceased father, the defendant and his brothers took certain property subject to a charge of Rs. 36 a year in favour of the plaintiff. The second paragraph of the plaint states that, in virtue of an agreement therein referred to, the defendant was bound to pay to the plaintiff Rs. 12 a year out of the Rs. 36 a year already referred to. An examination of this agreement shows that the defendant and his brothers in distributing this charge of Rs. 36 per annum amongst themselves, expressly referred to it as an allowance for the maintenance of this plaintiff. It is quite clear that the money in respect of which the suit is brought is claimed as part of an annuity due to the plaintiff. The only point about which there can be any controversy is whether this annuity is of such a nature as to make suit for the recovery of a portion of it a suit "relating to maintenance" within the meaning of article 38 of schedule II to the Provincial Small Cause Courts Act, No. IX

(1) (1905) 2 A. L. J., 697.

(3) (1904) 13 M. I. J., 471.

(2) Weekly Notes 1890 n. 201.

(4) (1890) 1 L., R. 13 All., 277.

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of 1887. The suit was filed in a Court of Small Causes, and no objection to the jurisdiction of that court was taken by the defendant. The application now before me assails the jurisdiction of the court below to entertain the suit. The point ought certainly to have been taken in that court; but at the same time I am not prepared to hold that jurisdiction can be conferred by consent of parties. I think that, if the plea had been taken, as it ought to have been, it is exceedingly probable that the court below would have regarded the question as at least so far open to doubt as to warrant an order under section 23 of Act No. IX of 1887. I think the defendant, who is the applicant before this Court, is entirely to blame for the necessity he has been under of bringing this question of jurisdiction before this Court, and that notice should be taken of this fact in the Court's order as to costs. I am of opinion, however, that the suit is one the cognizance of which by a Court of Small Causes was barred by article 38 aforesaid. I do not see that this conclusion can be avoided by any line of reasoning which would not involve raising, in the alternative, the question whether the jurisdiction of the Small Cause Court was not barred by article 11 or article 28 of the same schedule. On behalf of the plaintiff I have been referred to two cases of this Court: *Mahadeo Rai v. Deo Narain Rai* (1) and *Masum Ali v. Mohsen Ali* (2). Both cases are clearly distinguishable. In the former the claim was for arrears of an allowance originally granted in favour of one person, by a plaintiff who claimed to be entitled to continue in receipt of that allowance as the heir of the person in whose favour the allowance had originally been granted. Either therefore the plaintiff was not entitled to this money at all, or he could not be said to be entitled to it as maintenance; for a maintenance allowance necessarily comes to an end with the death of the person in whose favour it was granted. In the other case the learned Judge of this Court who decided it laid great stress upon the fact that the circumstances of the suit were such that neither the right of maintenance nor the amount of maintenance were matters in issue requiring determination in that case. In the present case the question of the plaintiff's right to receive this annuity required determination and has been determined by

(1) (1905) 2 A. L. J., 697.

(2) Weekly No. 1890, p. 201.

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the court below. If therefore this annuity was of the nature of a maintenance allowance, the cognizance of the Court of Small Causes was barred. In my opinion it was so barred. I set aside the decree of the court below and in lieu thereof direct an order to be passed returning the plaint for presentation to a regular Civil Court having jurisdiction to entertain the same. The defendant will in any event bear all costs hitherto incurred in the court of first instance and his own costs of this application.

Decree varied.

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*Before Justice Sir George Knox, Acting Chief Justice, Mr. Justice Tudball and
Mr. Justice Muhammad Rafiq*
MUHAMMAD FAIYAZ ALI KHAN (PLAINTIFF) v. BIHARI AND ANOTHER
(DEFENDANTS)*

Evidence—Statement in wajib-ul-arz—Suit to recover 'Pargot'.

Plaintiff sued as owner of the *abadi* of a village to recover a certain number of maunds of cotton seed from the defendants, who were banias having shops in the said *abadi*, and his claim was based mainly upon an entry in a wajib-ul-arz framed some fifty years before suit, to the effect that tenants living in the village did not pay '*kiraya*' (rent of a house), but '*pargot*' (ground-rent), which, for banias, was one maund of cotton seed a year for each shop.

Held that the entry in the wajib-ul-arz was reliable evidence of the liability of the defendants to pay '*pargot*' to the zamindar in the manner described, and that the use of the word indicated that the origin of the payment was an agreement between the inhabitants of the *aladi* and the zamindar rather than a custom.

THE plaintiff was the sole zamindar of village Balika and owner of the whole of the *abadi*. The defendants were banias who occupied grocery shops in the *abadi*. The plaintiff alleged that there was a custom according to which the banias of the bazar were liable to deliver to the zamindar one maund of *binawla* (cotton seed) per shop at the end of each year, and that the custom was recorded in the wajib-ul-arz of 1866, prepared at the former settlement. Paragraph 2 of the wajib-ul-arz stated as follows:—"*Reyaga bashinda deh se kiraya nahin liya*

* Second Appeal No. 857 of 1916, from a decree of Durga Dat Joshi, First Additional Judge of Aligarh, dated the 1st of December, 1915, confirming a decree of Kaulashar Nath Rai, Munsif of Bulandshahr, dated the 25th of August 1915.

jata hai Aur babat parjot . . . bashindagan deh se batafsil zarf liya jata hai. Babat parjot sal tumam ; baqqalan bazar fi-dukan binarula ek man ;'' No such entry was contained in the *dastur dehi* of the last settlement. The plaintiff claimed 3 maunds *binarula* for the three years preceding the suit, or its value, Rs. 12. The defendants denied the existence of any such custom of realizing *parjot* (ground-rent) from the shops in the village and stated that they had never delivered any *binarula* or its equivalent ; they further stated that the entry in the *wajib-ul-arz* did neither record nor prove custom, but was a mere statement or expression of the wish of the zamindar ; and that, at the most it evidenced a contract made by the plaintiff, the term whereof expired at the end of the former settlement. The court of first instance held that the entry in the *wajib-ul-arz* was good evidence of and proved custom ; that the payment claimed was of the nature of a *parjot* or ground-rent and not of a cess ; and that the plaintiff had failed to prove that he had ever realized anything from any shop since 1866, which fact coupled with the absence of any entry in the *dastur dehi* of the last settlement showed that the custom had fallen into desuetude and could not now be enforced. The suit was accordingly dismissed. On appeal, the lower appellate court held that the *wajib-ul-arz* of 1866 did not record a custom and that the custom was not proved ; and the appeal was dismissed. The plaintiff went in second appeal to the High Court

Maulvi *Iqbal Ahmad*, for the appellant :—

The entry in question in the *wajib-ul-arz* of 1866 *prima facie* recorded a custom. The silence of the later *dastur dehi* on the point did not necessarily disprove the custom. The entry, if it did not evidence a custom, at any rate evidenced an arrangement which was come to 50 years ago. The statement was made as long ago as that and recorded by the settlement officer and allowed to remain unchallenged in *wajib-ul-arz*. Such an entry was more than the mere statement of the zamindar. There was no reason to suppose that the statement was then made with a view to future fraud. The lower court had failed to appreciate the evidential value of the entry as a statement made by a deceased person long before any controversy arose. The entry

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stood un rebutted. Mere non-receipt of the ground-rent for a number of years did not disprove the zamindar's title to receive it. Secondly, the zamindar was entitled, apart from any question of custom or entry, to reasonable compensation from the defendants for their use and occupation of his land. They did not plead that they had acquired any exemption by the payment of a *nazrana* or otherwise.

Munshi *Panna Lal*, for the respondents :—

The claim as set forth in the plaint was founded solely and purely upon an alleged custom. The custom having failed, the suit was bound to fail with it, and the plaintiff was not entitled to fall back upon anything else. The entry in the *wajib-ul-arz* relied on by the appellant was the statement of a single zamindar who owned the whole village and could not be considered as evidencing a custom. As for its evidencing an arrangement, the respondents or their predecessors in interest were no parties to the settlement and could not be bound by any statement made by the zamindar at the settlement. They were not even aware of what was being stated or entered. At all events the entry was no evidence that any such arrangement continued after the expiry of the former settlement and existed after 1887. There was no similar entry in the *dastur dehi* of 1887. Further, the alleged arrangement was never enforced or acted upon. Whatever might have been the intention when the statement was made it did not appear that the "arrangement" was ever acted upon. Another point was whether the payment was not of the nature of a cess, and as such irrecoverable under the prohibition of section 56 of the Land Revenue Act. The following cases were referred to :—*Sis Ram v. Asghar Ali* (1), *Sadanand Pande v. Ali Jan* (2).

Maulvi *Iqbal Ahmad*, in reply, referred to the case of *Balwant Singh v. Shankar* (3).

KNOX, A. C. J., and TUDBALL and MUHAMMAD RAFTQ, JJ. :—

This appeal arises out of a suit brought by Nawab Muntaz-ud-daula Fayaz Ali Khan, who in his plaint sets himself out as, and who is further admitted to be, the sole zamindar of the village to

(1) (1912) I. L. R. 35 All. 19. (2) (1910) I. L. R. 32 All. 198.

(3) (1908) I. L. R. 30 All. 225.

which this appeal relates. The respondents are in the plaint described as the village banias and as being shop-keepers in the said village. The plaintiff is claiming 12 maunds of cotton seeds or the value thereof. It is true that in the plaint the plaintiff set out that there was a custom of such payment in the village. This amount of seed is payable for each shop occupied by the banias in the bazar. But in the written statement, which was filed, we note that the respondents themselves alleged that at the most the entry in the *wajib-ul-arz* amounts to an agreement between themselves and the plaintiff, the terms of which expired at the end of the former settlement of 1866. As the case went on it was evident that the courts below tried the question between the plaintiff and the defendants as a question of *parjot*. The court of first instance held that the payment of this *parjot* was a custom proved. He says that it is *parjot*, or ground-rent, and not a cess, and cannot be called illegal, and the *wajib-ul-arz* of 1866 is good evidence of the custom set up by the plaintiff, but the court went on to hold that the custom had fallen into desuetude, and dismissed the claim of the plaintiff. The plaintiff went in appeal to the District Judge of Aligarh. That court took a different view from the court of the first instance, and held that the custom to take ground-rent had not been proved. It therefore dismissed the appeal. The plaintiff comes here in second appeal, and the first plea taken by him is that the entry in the *wajib-ul-arz* is a record of custom and proves the custom set up by the plaintiff appellant, and a further plea is taken that in any case the plaintiff appellant is entitled to get a reasonable rent of the land in the possession of the defendants respondents. We are of opinion that the word 'custom' throughout has been wrongly used. In case of an agreement between the plaintiff and the defendants it can never be said for a moment that the rent they paid was rent payable by force of custom. The word used in the *wajib-ul-arz* is *parjot*, and points to the fact that if the payment of anything from the respondent to the appellant was due, it was a matter based upon some agreement in the first instance. At first sight the way in which this payment was to be made may strike one as somewhat strange.

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sanctions the view that rent may be something paid in cash and also something paid in kind. When this is borne in mind we are of opinion that the lower appellate court has approached the evidence it had to consider from a wrong point of view. There is on the record the *wajib-ul-arz* of 1870. We had that *wajib-ul-arz* read to us and we see nothing in the language which will justify the inference that the matters recorded in paragraph 2 were unlikely or improbable. We look upon that paper as a statement made fifty years ago more or less, by a person who was qualified and had the knowledge necessary to make it. It is not a statement narrating a tradition, but it is a statement by a person possessing an interest and an existing right in the village. It is extremely improbable that the person was making a statement to perpetrate a fraud or was making a statement which was false to be used fifty years afterwards. There was nothing to rebut that statement, and we hold that the payment of *parjot* by the respondent to the appellant is proved thereby.

We accordingly set aside the decrees of both the courts below and decree the plaintiff's claim with costs in all courts and future interest at the usual rate.

Appeal decreed.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

MUHAMMAD ISA KHAN (PLAINTIFF) v. MUHAMMAD
KHAN (DEFENDANT). *

Act (Local) No. II of 1901 (Ag a Tenancy Act), sections 134 and 156—Munafi land—Suit for resumption—Portion of munafi grant converted into a grove but restored to the position of agricultural land before suit

Where a certain area had been held rent-free for fifty years and by two successors to the original grantee, but part of the area had at one time been occupied by a grove, which, however, had ceased to exist some fifteen years before suit, it was held, on suit for resumption, that there was no justification for drawing a distinction between that part of area which had at one time been a grove, and the rest, which had all along been cultivable land, and

* Second Appeal No. 1793 of 1915, from a decree of W. F. Kirton, Second Additional Judge, of Aligarh, dated the 17th of August, 1915, reversing a decree of Muhammad Azim-ullah, Assistant Collector, First Class, of Aligarh.

that, as section 154 of the Agra Tenancy Act, 1901, did not apply, no portion of the area could be resumed.

This was a suit under chapter X of the Tenancy Act for resumption of a rent-free grant. It was found that part of the area had formerly been a grove, but that the trees had been cut down and the land brought under cultivation some time more than 12 years before suit. It was also found that the whole of the area had been held rent-free for over 50 years and by two successors to the original grantee and that it was not liable to resumption under section 154 of the Tenancy Act. The first court held with respect to the portion on which the grove had existed that it had not been held for 50 years as "land" within the meaning of the term as defined in the Tenancy Act and could not therefore get the benefit of section 158. The court held that the defendant was an occupancy tenant of this portion and assessed it to rent. On appeal the District Judge held that "if the land was not *muafi*, then from the time that the grove was cut it became liable to rent, and as no suit was brought with respect to it within 12 years, the plaintiff's suit must be dismissed and the defendant has acquired a proprietary title in it by adverse possession. The District Judge held accordingly that the whole of the area was held in proprietary possession by the defendant. A second appeal by the plaintiff to the High Court was heard by a single Judge who referred the case to a Bench of two Judges.

Dr. S. M. Sulaiman, (with Mr. M. L. Agarwala), for the appellant :—

The lower appellate court has erred in holding that the mere fact that no suit for rent was brought for 12 years makes the the defendant's possession adverse. The defence did not even allege adverse possession.

[Maulvi Iqbal Ahmad, for the respondent, intimated that he would support the decree on the ground that the requirements of section 158 had been fulfilled by the portion of the area in question.]

It has been consistently held by this Court that an area covered by a grove is not "land" as defined by section 4, clause (2), of the Tenancy Act as it is not held for "agricultural purposes"; *Habibullah v. Kalyan Das* (1), and the authorities there referred

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to. The word "land" is used in chapter X of the Tenancy Act in the same sense as in section 4, clause 20; *Hadi Hasan Khan v. Pati Ram* (1). The area in question has not been held as "land" for more than 50 years and does not satisfy the conditions laid down by section 158.

Maulvi Iqbal Ahmad, for the respondent: -

It is submitted that the view, that an area covered by a grove is not "land" as defined in the Tenancy Act is not sound. A reference to section 4, clause (12) (c), shows that the planting of trees is an agricultural purpose. The Board of Revenue took the correct view in *Ram Sunder Koiri v. Jogi Khatik* (2). The subsequent case of *Megh Singh v. Musummat Nazar Fatma* (3) drew a distinction without a difference between a guava grove and a mango grove. The next question is whether the word "land" is used in section 158, and the other sections of chapter X of the Tenancy Act, in the restricted sense which has been given to it in section 4, clause (2). The definitions given in that section are subject to the opening words "unless there is something repugnant in the subject or context," and to interpret the word "land" as used in chapter X in the restricted sense would be repugnant to the subject. Further, according to the findings, the land ceased to be a grove and became "land" in the restricted sense before the coming into operation of the present Tenancy Act and has continued to be so up to the present time. The former Acts contained no provision restricting the meaning of the word "land" and under those Acts grove lands were undoubtedly "land" within the meaning of those Acts. So that, during the whole of the period for which this area has been held rent-free it has at each point of time been held as "land" within the meaning of the Act in force at that time. It has, therefore, fulfilled the conditions of section 158. That section does not say that the land must have been held for 50 years "as land" within the meaning of the definition given in the present Act. "The case *Hadi Hasan Khan v. Pati Ram* (1) is distinguishable, as there the grove continued as such after the coming into operation of the present Act right up to the date of suit.

Dr. S. M. Subhman in reply :—

Section 4, clause (12) (c), is of no help, for it pre-supposes a "holding" *i.e.*, land which is let or held for agricultural purposes, and goes on to say that the planting of trees on the "land" may be an improvement if it is suitable to the holding and consistent with the purpose thereof. It has not been shown how the interpretation of the word "land" in chapter X in the sense of its definition would be repugnant to the subject.

PRAGOR, J.—This is a second appeal by the plaintiff in a suit for resumption brought under the provisions of chapter X of the Tenancy Act, (Local Act No. II of 1901). The court of first instance found that the whole of the area specified at the foot of the plaint had been held rent-free by the defendant for 50 years, and by two successors to the original grantee. It also found that the land was not liable to resumption at the pleasure of the grantor, or under any of the other conditions laid down by section 154 of the same Act. The learned Assistant Collector, however, felt himself compelled to draw a distinction between two portions of the area in suit. With regard to plots of land making up a total area of seven bighas, which had never been anything but cultivated or cultivable land, the finding was that the provisions of section 158 of the Tenancy Act clearly applied and that the defendant must be deemed to hold the same in proprietary right. With regard to the remaining 9 bighas, 16 biswas, it was found that this area had at one time been occupied by a grove. This grove had ceased to exist something more than 12 years, probably about 15 years, prior to the institution of the suit, and during this latter period the land had been under cultivation. The Assistant Collector, however, in accordance with certain decisions of this Court and also with what appears to be the latest pronouncement of the Board of Revenue on the subject, held that land constituting a grove was not land let or held for agricultural purposes within the meaning of the definition in section 4, clause 2, of the Tenancy Act, No. II of 1901. From this he went on to conclude that the provisions of section 158 of the same Act could not apply to this area because it was not shown to have been held for 50 years as "land" within the meaning of the definition above referred to. He went on to conclude that the plaintiff was

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entitled to have rent assessed on this area, and he framed his decree accordingly. Both parties appealed to the District Judge. On the main question in issue the learned Judge has agreed with the first court. We must accept the findings of fact arrived at, namely, that the entire area in suit had as a matter of fact been held rent-free for 50 years by the defendant and by at least two successors to the original grantee. We find it also impossible to interfere with the decision of the lower appellate court that the provisions of section 154 of the Tenancy Act do not apply to to any portion of the area in suit. On these findings the appeal of the plaintiff in the court below against that portion of the decree of the Assistant Collector which was adverse to him was necessarily dismissed. The learned Judge then went on to consider the appeal of the defendant. He was evidently of opinion that the area in suit, forming part of a rent-free holding, must necessarily be subject to the provisions of section 158 of the Tenancy Act. He endeavoured, however, to place his decision in the form of a dilemma against the plaintiff. With regard to the area of 8 bighas, 16 biswas, which the first court had ordered to be assessed to rent, the lower appellate court remarks that this area was either a part of a rent-free grant or it was not. Supposing, says the learned Judge, that it was not, then the only possible conclusion from the facts is that the defendant had been holding it adversely to the plaintiff for a period of more than 12 years prior to the institution of the suit. There was an appeal to this Court which came in the first instance before Mr. Justice TUDBALL. It may be said at once that it is somewhat difficult to affirm the decision of the lower appellate court on the precise ground on which it proceeds. The plain fact of the matter is that the land in suit is part of a rent-free grant. The plaintiff himself said so in his plaint and framed his plaint on that assumption. It seems impossible, therefore, to decide the question on the hypothetical assumption of a state of things which is clearly contrary to the pleadings as well as to the ascertained facts. The defendant respondent, nevertheless supports the decision of the court below on the broad ground that the whole of the area in suit, and not merely part of it, must be held to fall within the provisions of section 158 of the Tenancy Act.

the case first came was asked to reconsider the question of the applicability of the definition of the word "land" already referred to. In view of the decision of a Bench of this Court in *Hasan Khan v. Pati Ram* (1), as to the correctness of which he evidently entertained serious doubts, Mr. Justice TUDBALL referred this case to a Bench of two Judges. The matter has now been fully argued out before us. There seems to have been a long course of decisions in this Court on the definition of the word *land* as applied to groves. An elaborate pronouncement on the subject by Mr. Justice SUNDAR LAL is to be found in *Habib-ullah v. Kalyan Das* (2). In view of the fact that the amendment of the Local Tenancy Act is now under the consideration of the authorities, I am particularly anxious not to reconsider or unsettle, except under pressure of necessity, any principles which seem to have been definitely affirmed by this Court with regard to the provisions of the existing Tenancy Act, nor do I think that it is really necessary in the present case to determine whether an area covered by trees and forming a grove is or is not land let or held for agricultural purposes, or even the narrower question whether in chapter X of the Tenancy Act, or at least in some of the sections falling within that chapter, it should not be held that there is something repugnant in the context to the application of strict definition of the word "land." I think that the present case may be quite satisfactorily and most conveniently decided upon its own facts. The appeal now before us is confined to the area of 9 bighas, 16 biswas, which at one time formed a grove. We do not know for certain whether this grove was planted by the original grantee or formed part of the original grant in the sense that the grant when made was one of a grove along with certain cultivated or culturable land. In any case there is no suggestion in the pleadings, or in the evidence, that there were more than one grant. The area in question in this appeal therefore did form part of a rent-free grant in favour of the predecessors in title of the present defendant. The grove ceased to exist before the present Tenancy Act, No. II of 1901, came into force. Under the previous Act, namely, the Rent Act, No. XII of 1881, there was no express definition of the word

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entitled to have rent assessed on this area and to obtain a decree accordingly. Both parties appealed to the District Judge. On the main question in issue the District Judge is agreed with the first court. We must set up the main point arrived at, namely, that the entire area in suit had been or had in fact been held rent-free for 50 years by the defendant and by at least two successors to the original grantee. We find it impossible to interfere with the decision of the lower appellate court that the provisions of section 154 of the Tenancy Act do not apply to any portion of the area in suit. On these findings the appeal of the plaintiff in the court below against that portion of the decree of the Assistant Collector which was adverse to him was necessarily dismissed. The learned Judge then went on to consider the appeal of the defendant. He was evidently of opinion that the area in suit, forming part of a rent-free holding must necessarily be subject to the provisions of section 158 of the Tenancy Act. He endeavoured, however, to place his decision in the form of a dilemma against the plaintiff. With regard to the area of 9 bighas, 16 biswas, which the first court had ordered to be assessed to rent, the lower appellate court remarks that this area was either a part of a rent-free grant or it was not. Supposing, says the learned Judge, that it was not, then the only possible conclusion from the facts is that the defendant had been holding it adversely to the plaintiff for a period of more than 12 years prior to the institution of the suit. There was an appeal to this Court which came in the first instance before Mr. Justice TUDBALL. It may be said at once that it is somewhat difficult to affirm the decision of the lower appellate court on the precise ground on which it proceeds. The plain fact of the matter is that the land in suit is part of a rent-free grant. The plaintiff himself said so in his plaint and framed his plaint on that assumption. It seems impossible, therefore, to decide the question on the hypothetical assumption of a state of things which is clearly contrary to the pleadings as well as to the ascertained facts. The defendant respondent nevertheless supports the decision of the court below on the broad ground that the whole of the area in suit, and not merely part of it, must be held to fall within the provisions of section 158 of the Tenancy Act. In this connection the learned Judge of this Court before whom

the case first came was a need to reconsider the question of the applicability of the definition of the word "land" already referred to. In view of the decision of a Bench of the Court in *Hadi Hasan Khan v. Pali Ram* (1), as to the correctness of which he evidently entertained serious doubts, Mr. Justice TUDBALD referred this case to a Bench of two Judges. The matter has now been fully argued out before us. There seems to have been a long course of decisions in this Court on the definition of the word *land* as applied to groves. An elaborate pronouncement on the subject by Mr. Justice SUNDAR LAL is to be found in *Habibullah v. Kalyan Das* (2). In view of the fact that the amendment of the Local Tenancy Act is now under the consideration of the authorities, I am particularly anxious not to reconsider or unsettle, except under pressure of necessity, any principles which seem to have been definitely affirmed by this Court with regard to the provisions of the existing Tenancy Act, nor do I think that it is really necessary in the present case to determine whether an area covered by trees and forming a grove is or is not land let or held for agricultural purposes, or even the narrower question whether in chapter X of the Tenancy Act, or at least in some of the sections falling within that chapter, it should not be held that there is something repugnant in the context to the application of strict definition of the word "land." I think that the present case may be quite satisfactorily and most conveniently decided upon its own facts. The appeal now before us is confined to the area of 9 bighas, 16 biswas, which at one time formed a grove. We do not know for certain whether this grove was planted by the original grantee or formed part of the original grant in the sense that the grant when made was one of a grove along with certain cultivated or culturable land. In any case there is no suggestion in the pleadings, or in the evidence, that there were more than one grant. The area in question in this appeal therefore did form part of a rent-free grant in favour of the predecessors in title of the present defendant. The grove ceased to exist before the present Tenancy Act, No. II of 1901, came into force. Under the previous Act, namely, the Rent Act, No. XII of 1881, there was no express definition of the word

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land, but the provisions of that Act undoubtedly applied to groves just as much as to cultivated or cultivable lands. The area now in suit, therefore, was always land to which the provisions of the Tenancy Act for the time being in force applied. The ruling in *Hadi Hasan Khan v. P. H. Ram* (1) cannot possibly be applied to the facts of the present case, since the area in question having been brought into cultivation more than 12 years before the institution of the suit was always "land" within the strictest meaning of the definition, both at the time when the present Tenancy Act, No. II of 1901, came into force and right down to the date of the institution of the suit. I think, therefore, that it is impossible to distinguish, as the Assistant Collector endeavoured to do, between the two portions of the area in suit. The whole formed a rent-free grant and was subject to the provisions of Chapter X of Act II of 1901, under any possible interpretation of the word "*land*," because the entire area had always been under cultivation while that Act was in force. If, therefore, the conditions laid down by section 158 of the Tenancy Act are proved to have been satisfied in respect of the entire area in suit, and it is so found by the lower appellate court, there seems no valid reason for drawing a distinction against the area now under appeal merely on the ground that it had at one time formed a grove. On this ground alone I would dismiss this appeal with costs.

WALSH, J.—I agree. The circumstances of this case are exceptional. I have come to the conclusion that in an admitted tenancy such as this was, the word *land* in section 158 must be held capable of including land other than land as defined in section 4. It would be "repugnant to the subject," to quote the language of section 4, to hold that the word *land* in this particular case did not include the land on which this grove had stood. The result of doing so would be that, while holding chapter X of the Tenancy Act applicable to the tenancy, we should be driven to hold that it did not apply to land which formed the subject of tenancy, and that I think is the very thing which is meant by the somewhat unusual language in the definition clause, namely, "repugnant to the subject." I wish carefully to guard myself against being

(1) (1913) I. L. J. R., 95 All., 200.

taken to hold anything more. In my opinion it by no means follows that all or any grove I do for more than 50 years by two successors to the original grant come within section 158, or that, for example, section 16 can be used by an occupier or grove-holder by adopting the construction which is the right one in this particular case. It is for that reason that I think it necessary to say that I adopt the very cleverly reasoned judgement of Mr. REYNOLDS, the Senior Member of the Board, to be found in the Selected Decisions of the Board of Revenue, No. 4 of 1911. I think the view there clearly laid down in a series of propositions is not only correct but entirely consistent with the view which we are taking:—"The custom generally prevailing in these Provinces is that the grove-holder is a tenant paying rent. This was crystallized in the definition of *rent* and *tenant* given in section 4. Groves are in my opinion equally clearly not *land* as defined in section 4. If they were *land* within that definition there would be no need to differentiate them from *land* in the definition of *rent*. If a land-holder seeks to get rid of a grove-holder he cannot take action under chapter X, as that chapter refers to *land* only. But he may sue to eject under section 58 as the grove-holder is an occupier or tenant." The Senior Member then goes on to discuss the nature of tenancy and adds:—"Probably in the majority of cases, either by village custom or by special contract, a grove-holder holds not from year to year but so long as the grove exists. In all cases then, when a land-holder seeks to eject a grove-holder, the question of the existence of such custom or contract should almost invariably be made a matter in issue. It follows from what I have said that a grove-holder cannot generally acquire rights of occupancy in the land on which the trees grow." These statements of the law, which I take to be correct, obviously apply to a vast majority of cases of ordinary tenancy between a grove-holder and a land-holder. The case we are dealing with is not one of those ordinary cases. It is a case admittedly of a tenancy wholly independent of and unconnected with a grove as such. It appears to me a mere incident or accident in its history that at one time it became, or a portion of it became, a grove so as not to be *land* within the strict definition of the term. I think we are both

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agreed that that accident does not make it any the less a conveyance of land within the meaning of section 138, and therefore the rights of the parties under that section have been rightly applied.

By THE COURT.—We dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before M. J. C. P. C.

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July, 28.

KHURSHED ATAM KHAN AND OTHERS (PLAINTIFFS) v. RAHMAT-UD-DIN KHAN AND ANOTHER (DEFENDANTS).*

Civil Procedure Code (1908), order XLVII, rule 5—Review of judgment—Appeal from order granting review—Grant of appeal.

On appeal under order XLVII, rule 5, of the Code of Civil Procedure 1908, from an order granting an application for review of judgment, the appellant is strictly limited to the grounds set forth in the rule.

THE facts of this case are fully set forth in the judgment. Briefly stated they were as follows:—The plaintiffs' suit for possession, mesne profits and certain sums of money was decreed in part and dismissed as to the rest. More than 90 days afterwards the plaintiffs applied for a review of judgment on two grounds, (1) that the court had overlooked the defendants' admission of liability in respect of a particular item of money which ought to have been decreed; and (2) that in view of the facts found the court should have, in accordance with the plaintiffs' general prayer "for any other relief," granted them joint possession with the defendants of certain holdings, although the plaintiffs had claimed exclusive possession of a half share, and such claim was dismissed as being in contravention of section 32 of the Tenancy Act. The defendants objected, *inter alia*, that the application for review was made beyond time. The court overruled the plea with the observation that "there was no force in the plea," and granted the application for review and modified the decree accordingly. The defendants appealed against the order granting the application for review, and the principal grounds of appeal were that there were no adequate grounds for granting the application for review, and that it was barred by time. The appellate court held that according to Article 173 of the

* Civil Revision No. 21 of 1917.

Limitation Act the application for review was beyond time, and the appeal was allowed. The application applied to revision to the High Court.

Dr. S. M. *Solaiman* for *Muhammed Tahir Ahmad*, for the applicants :—

Power to interfere in appeal from an order granting an application for review is expressly limited by the provisions of clauses (a), (b) and (c) of sub-rule (1) of order XLVII, rule 7. The appeal did not raise any questions under clause (a) or (b). And under clause (c), unless the appellate court came to the conclusion that the application for review was not only presented beyond time but also without sufficient cause for the delay, it would have no jurisdiction to interfere in appeal. There is no finding at all by the appellate court as to whether there was or was not sufficient cause for admitting the application after expiry of the prescribed period. At any rate there has been material irregularity in the exercise of jurisdiction by the appellate court, inasmuch as that court has reversed the order granting review without finding that the admission of the application beyond time was without sufficient cause. Further section 14 of the Court Fees Act and article 4 of schedule I to that Act show that the Legislature contemplates and recognizes the presenting of applications for review after the expiry of the 90 days prescribed by article 173 of the Limitation Act. On the facts the applicants had amply made out good and sufficient cause for admitting the application for review.

Munshi Harmandan Prasad, (for *Munshi Iswar Saran*), for the opposite party :—

No revision lies on a ground of limitation. It has been repeatedly laid down that even if the lower court has come to an erroneous decision on a question of limitation that does not furnish a ground for entertaining a revision. The objection taken to the decision of the lower appellate court is merely technical. Even if the narrow construction sought to be put upon the terms of clause (c) of order XLVII, rule 7, be the correct one, the grounds of appeal sufficiently covered an objection based on that clause. Not even the first court had found that there was any sufficient cause for the late presentation of the application.

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for review. Under the circumstances an explicit finding on this point by the lower appellate court was unnecessary, as the applicants had failed to discharge their duty of proving sufficient cause. Article 173 of the Limitation Act is not controlled by any provisions contained in the Court Fees Act. On the merits, there was no sufficient cause for the delay and the application was not maintainable.

Piggott, J.—This is an application in revision against an order of the District Judge of Gorakhpur admitting an appeal, presented under order XLIII, rule 1 (a) and order XLVII, rule 7, of the Code of Civil Procedure, against an order of the Subordinate Judge of Basti granting an application for review of a certain judgement and decree of his own court. No second appeal lies against the order of the District Judge, and the only question which I have to consider is whether the applicants now before me, who were the plaintiffs in the suit, have brought their case within the purview of section 115 of the Code of Civil Procedure. The facts of the case are somewhat peculiar. The plaintiffs' claim was one for possession of certain property, together with mesne profits and certain other sums of money claimed as due to the plaintiffs under their cause of action. The claim was partly decreed and partly dismissed, and as a matter of fact the plaintiffs took out execution of the decree to the extent to which it was in their favour. They subsequently applied for review of judgement and their application was allowed. The result of the review was that a declaration in their favour in respect of a certain item of property was substituted for the order dismissing their claim in respect of that property altogether which appeared in the original decree. Consequently upon this order there was a further decree in favour of the plaintiffs for a certain sum as mesne profits. There was also added to the decree an award in favour of the plaintiffs in respect of another small item of money, their claim to which had been dismissed in the decree as originally framed. It must be remembered that the defendants had a right of appeal against the amended decree: if that decree was wrong in law, or inequitable on the facts, the error could have been set right by the District Judge in a regular appeal from the decree. The defendants, however, elected to exercise their alternative right of appeal.

against the order granting review of judgement. Now this right has been rigidly limited by the provisions of order XLVII, rule 7, of the Code of Civil Procedure to certain very narrow grounds. The reasons for the limitation then imposed upon the right of appeal from an order granting a review of judgement are obvious. A court presumably only review a previous judgement of its own when it is satisfied that its previous judgement was wrong and unfair to one of the parties. If the judgement is passed upon review is in error, an appeal lies against it, as has already been pointed out. Consequently the Legislature does not intend that the discretion of a court in the matter of granting a review of its own judgement should be interfered with in appeal, except on the specific grounds set forth in order XLVII, rule 7, of the Code of Civil Procedure. The petition of appeal presented to the District Judge did not challenge the order granting review of judgement on any of the grounds set forth in clause (1) (a) and (b) of rule 7 order XLVII, of the Code of Civil Procedure. There was a plea that the application for review had been presented to the Subordinate Judge after the expiration of the period prescribed therefor. There was also a plea that the first court had granted review of its judgement without sufficient cause; but it seems to me that it is at least open to question whether the memorandum of appeal presented to the District Judge can be regarded as challenging the order granting review of judgement on the ground that the application had been made after the expiration of the period of limitation prescribed therefor and that it had been admitted without sufficient cause. That seems to be the meaning of clause (c) of order XLVII, rule 7 (1), of the Code of Civil Procedure. At any rate the District Judge has not decided this point. The question of limitation has not been dealt with in a very satisfactory manner by either of the courts below. The learned Subordinate Judge merely takes note of the fact that the defendants have challenged the application for review of judgement on the ground of its having been presented after the expiration of the prescribed period of limitation and he remarks that there is no force in this objection. I think the learned Subordinate Judge was of opinion that, because the application for review had been presented after the 90th day from

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the date of the decree under the provision of article 4 of the first schedule to the Court Fees Act, No. VII of 1870, no question of limitation could be raised in respect of it. I think this point is a very arguable one. I should feel considerable hesitation in holding that the plain words of article 173 of the first schedule to the Indian Limitation Act No. IX of 1908 could be interpreted subject to anything contained in the Court Fees Act. On the other hand nothing in the Limitation Act can be treated as limiting the inherent power of a court to amend its own judgments or errors, which is now expressly recognized by sections 151, 152, and 153 of the Code of Civil Procedure. As a matter of fact the application for review presented to the learned Subordinate Judge raised two distinct points. It called attention to what was unquestionably a mistake or error apparent on the face of the record, in that the decree as originally framed operated to dismiss the plaintiffs' claim for certain small sums of money in respect of which the defendants had admitted liability in their written statement. In the second place it raised a more debatable question, in that it asked the learned Subordinate Judge to reconsider his decision dismissing altogether the plaintiffs' claim in respect of one of the items of immovable property specified at the foot of the plaint. The order of dismissal had been passed on the express ground that the plaintiffs claimed possession of a specified share of the said property, and had not sought either a decree for joint possession to the extent of their share, or relief by way of declaration. The plaintiffs now took leave to point out to the Court that its decision apparently overlooked a paragraph of the plaint in which there was a general prayer for such alternative relief as the court might consider suitable to the ascertained facts. The plaintiffs at the same time drew the attention of the Subordinate Judge to a reported decision of the Court in which a decree for a declaration of title and for mesne profits had been granted on a state of facts substantially similar to those which the plaintiffs had established in the present suit. The learned Subordinate Judge granted a review on both points. It is certainly arguable that the latter of those two points cannot, without some straining of language, be regarded as a mistake or error apparent on the face of the record. At the same

time the discretion conferred upon a court by the words 'for any other sufficient reason' in order XLVII, rule 1, of the Code of Civil Procedure is wide enough, and that 7 of the same order does not provide for a right of appeal against the exercise of such discretion. In the present case moreover, the learned Subordinate Judge found himself compelled to make out a variation in the decree passed by him, and he may well have considered that being thus seized of the whole matter he was entitled to take a liberal view of the extent of his jurisdiction in respect of the other question raised. The learned District Judge in appeal seems to have assumed that the first court had entirely overlooked the provisions of article 173 of the first schedule to the Indian Limitation Act. He has remarked that the application for review was clearly beyond time under the provisions of that article and has treated this finding as disposing of the entire question. On behalf of the defendants it has now been contended before me that I ought not to interfere with the decision of the court below in rely on the ground that it seems to me to have taken an erroneous view of the question of limitation. To this I should be prepared to accede; but the objection to the decision of the learned Judge is that he has reversed the order of the first court without coming to a finding that the conditions laid down by order XLVII, rule 7, of the Code of Civil Procedure as justifying interference in appeal with an order granting a review of judgment were completely fulfilled. He has not considered at all the question whether the application for review was or was not made after the expiration of the prescribed period without sufficient cause. I think that on this ground I should be justified in setting aside the order of the court below and sending back the appeal to be disposed of on the merits. After, however, having heard the parties at some length and fully examined the record before me, it seems to me useless to do this, and that the question of the order of the Subordinate Judge granting review of judgment should in the interests of the parties concerned be disposed of now once and for all. As a matter of fact there had been an error committed by the first court in the passing of its first decree which was eminently calculated to give trouble at a subsequent stage in the event of any question of limitation being

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ruled. A couple of days later the learned Subordinate Judge ordered the parties on the 2nd of December, 1914, to deposit a copy of the judgment and the order for review on the following day. The learned Judge also ordered that the parties have one week to prepare their application for review. I do not think that the decree was passed on the 3rd of December, 1914, as further consideration of the case, and a revised judgment previously delivered and entered a decree was prepared accordingly. The revised judgment was to have been drawn up. A copy of the judgment was received on the 2nd of December, 1914, and the order dated the 23rd of December, 1914, stating that the application was obviously framed and submitted upon the facts set forth into error as to the period within which the application for presentation of an appeal or for presentation of an application for a review of judgment. If they could be allowed to calculate the period of limitation from the 23rd of December, 1914, and at the same time to add to the period necessary for obtaining a copy of the decree, the interval between the 3rd and 23rd of December, 1914, during which their application for copy presentation presented was lying in the copying department of the court, they would actually bring themselves within the limitation period. I do not say that this could be permitted, but it does seem to me that this was a case for the application of the provisions of section 5 of the Indian Limitation Act, which, let it be observed, refer to an application for review of judgment as well as to appeals. If the learned Subordinate Judge, in admitting the application for review, had relied on section 5 above mentioned, I do not think any question of limitation could possibly have been raised at any subsequent stage. That he did not do this in express terms may possibly have been due to the fact that he thought it unnecessary, and was more probably due to the view he took of the law of limitation applicable to an application for review of judgment stamped with the full fee payable. At any rate he did admit the application, and as there were in my opinion clearly sufficient grounds for its admission on the

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brother, who was joint with him, had not been made a party to it.

Mr. A. H. C. Hamilton, for the appellant.

The respondents were not represented.

RICHARDS, C. J., and BANERJI J. — The appeal arises out of an application made by the appellant to the District Judge of Meerut to be adjudicated an insolvent. It is not very clear from the judgement of the learned District Judge upon what grounds he rejected the application. Section 5 of the Provincial Insolvency Act provides that where a debtor commits an act of insolvency a petition for adjudication may be presented by a creditor or by the debtor. The presentation of a petition to be declared insolvent is deemed to be an act of insolvency within the meaning of the section. Section 15 (1) mentions certain matters which will justify the court in dismissing the petition of insolvency. Section 16 (1) provides that where a petition is not dismissed for any of the matters mentioned in section 15 the court shall make an order of adjudication. It would, therefore, appear that the court is only justified in refusing an order of adjudication in the cases prescribed by the Act. So far as we have been able to understand the order of the District Judge, he dismissed the application because he thought that it was necessary that the brother of Net Ram, who was joint with him, should have joined in the application. The concluding words of the order are "at present I reject the dishonest application of Net Ram as premature." We may refer to the recent decision of their Lordships of the Privy Council in the case of *Chhatraput Singh Dugar v. Kharay Singh Lachmiram* (1) and also to the case of *Triloki Nath v. Badri Das* (2). We allow the appeal, set aside the order of the learned District Judge and remand the case to him with directions to re-enter the application in the list of pending cases and proceed to hear and determine the same according to law. We make no order as to costs. No one appears on the other side and respondent No. 2 has not been served.

Appeal allowed.

(1) (1917) 15 A. L. J., 87.

(2) (1913) 1 L. R., 86 All., 250.

MISCELLANEOUS CIVIL.

Before Mr. Justice Eyre and Mr. Justice Walsh

MAN SINGH (PETITIONER) v. MUSHANMAT CHAND (OPPOSITE PARTY).*

*Hindu Law—Leprosy—Development of Hindu Law—Alienation and legal capacity to alienate property*1917.
November, 2.

There is no principle of Hindu law under which a person who contracts the disease of leprosy is thereby disqualified from alienating his own property or from dealing with joint family property as to his sons, provided the alienation is made for legal necessity.

THIS was a suit to set aside an alienation made by the father of the minor plaintiff of certain property which was admittedly the joint ancestral property of the minor and his father. The court of first instance and the court of first appeal both found that the alienation was made for legal necessity. There was an antecedent debt binding on the father which it was the son's duty to discharge, and in these circumstances an alienation by the father, even of joint ancestral property, would be binding on the son. There was, however, a second appeal preferred to the Commissioner of Kumaun, but the plea was there raised that the alienation was invalid because the father was at the time suffering from the disease of leprosy. The Commissioner accepted this plea; and reversing the decrees of the courts below, decreed the plaintiff's suit. At the instance of the defendant, the Local Government referred the case to the High Court under rule 17 of the Kumaun Rules, 1894.

Munshi *Lakshmi Narain*, for the petitioner.

Babu *Sheo Dihal Sinha*, for the opposite party.

Piggott and WALSH, JJ.—This is a reference by the Local Government under Rule 17 of the Rules and Orders relating to the Kumaun Division. The suit in question was brought to set aside an alienation made by the father of the minor plaintiff of certain property which was admittedly the joint ancestral property of the minor and his father. There is a concurrent finding by the court of first instance and by the court of first appeal to the effect that the alienation in question was made for legal necessity. There was an antecedent debt binding on the father, which it was the son's pious duty to satisfy, and under these

* Civil Miscellaneous No. 186 of 1917.

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brother, who was joint with him, had not been made a party to it.

Mr. A. H. C. Hamilton, for the appellant.

The respondents were not represented.

RICHARDS, C. J., and BANERJEE J. — This appeal arises out of an application made by the appellant to the District Judge of Meerut to be adjudicated an insolvent. It is not veried as from the judgement of the learned District Judge upon whose grounds he rejected the application. Section 5 of the Provincial Insolvency Act provides that where a debtor commits an act of insolvency a petition for adjudication may be presented by a creditor or by the debtor. The presentation of a petition to be declared insolvent is deemed to be an act of insolvency within the meaning of the section. Section 15 (1) mentions certain matters which will justify the court in dismissing the petition of insolvency. Section 16 (1) provides that where a petition is not dismissed for any of the matters mentioned in section 15 the court shall make an order of adjudication. It would, therefore, appear that the court is only justified in refusing an order of adjudication in the cases prescribed by the Act. So far as we have been able to understand the order of the District Judge, he dismissed the application because he thought that it was necessary that the brother of Net Ram, who was joint with him should have joined in the application. The concluding words of the order are "at present I reject the dishonest application of Net Ram as premature." We may refer to the recent decision of their Lordships of the Privy Council in the case of *Chhatrajit Singh Dugar v. Kharay Singh Lachmaram* (1) and also to the case of *Triloki Nath v. Badri Das* (2). We allow the appeal, set aside the order of the learned District Judge and remind the case to him with directions to re-enter the application in the list of pending cases and proceed to hear and determine the same according to law. We make no order as to costs. No one appears on the other side and respondent No 7 has not been served.

Appeal allowed.

(1) (1917) 15 A. L. J., 87.

(2) (1913) 1 L. R., 86 All., 250.

MISCELLANEOUS CIVIL.

Defendant Mr. Justice Piggott and Mr. Justice Walsh.

MAN SINGH (PETITIONER) v. MUSAMMAT GAINI (OPPOSITE PARTY).*

*Hindu Law—Leprosy—Development of law as to disqualification as regards capacity to deal with property.*1917.
November, 2.

There is no principle of Hindu law under which a person who contracts the disease of leprosy is thereby disqualified from dealing with his own property or from dealing with joint family property so as to bind his sons, provided the alienation is made for legal necessity.

THIS was a suit to set aside an alienation made by the father of the minor plaintiff of certain property which was admittedly the joint ancestral property of the minor and his father. The court of first instance and the court of first appeal both found that the alienation was made for legal necessity. There was an antecedent debt binding on the father which it was the son's duty to discharge, and in these circumstances an alienation by the father, even of joint ancestral property, would be binding on the son. There was, however, a second appeal preferred to the Commissioner of Kumaun, but the plea was there raised that the alienation was invalid because the father was at the time suffering from the disease of leprosy. The Commissioner accepted this plea; and reversing the decrees of the courts below, decreed the plaintiff's suit. At the instance of the defendant, the Local Government referred the case to the High Court under rule 17 of the Kumaun Rules, 1894.

Munshi *Lakshmi Narain*, for the petitioner.

Babu *Sheo Dihal Sinha*, for the opposite party.

PIGGOTT and WALSH, JJ.—This is a reference by the Local Government under Rule 17 of the Rules and Orders relating to the Kumaun Division. The suit in question was brought to set aside an alienation made by the father of the minor plaintiff of certain property which was admittedly the joint ancestral property of the minor and his father. There is a concurrent finding by the court of first instance and by the court of first appeal to the effect that the alienation in question was made for legal necessity. There was an antecedent debt binding on the father, which it was the son's pious duty to satisfy, and under these

* Civil Miscellaneous No. 186 of 1917.

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circumstances an alienation by the father, even of joint ancestral property, would be binding on the son. There was a second appeal to the court of the Commissioner of Kumaun and there the case took an entirely different turn. The learned Commissioner has not dissented from the finding that the alienation in question was made for legal necessity. He has taken up a plea, which was certainly suggested in the plaint as what may be called an alternative line of attack, to the effect that the alienation was invalid because the father, Sobha, was suffering from leprosy. The question before the court had nothing to do with the right of a person suffering from leprosy or similar incurable disease to inherit property: the property was the father's and had come to him from his ancestors. We have not been referred to any principle of Hindu Law, nor do we find that any such principle exists, under which a person who contracts the disease of leprosy is thereby disqualified from dealing with his own property or from dealing with joint family property so as to bind his sons, provided the alienation of the same is made for legal necessity. The Commissioner's order suggests an opinion on his part that, whatever may be the general Hindu Law on the subject, there is a custom prevalent in the Kumaun Division, and binding on the parties, which disqualifies a leper from dealing with his property. He refers to a decision of one of his predecessors in the year 1887, in which a somewhat anomalous principle is laid down that a leper has only a life-interest in any property belonging to him, that he can alienate that property for his life-time but cannot make any alienation binding upon his heirs or successors after his death. We do not find from an examination of the record that any local custom to this effect was pleaded, much less was established by evidence. The decision, therefore, seems to rest simply upon a pronouncement of the Kumaun High Court in the order of 1887, which may or may not have rested upon adequate evidence in that particular case, but which cannot be regarded as laying down a proposition of law binding upon the parties concerned in any future litigation. In the course of argument before us a suggestion has been thrown out that the order of the Commissioner might be supported, not on the ground on which it proceeds, but on the strength of

certain remarks made in the concluding portion of the Commissioner's judgment. It is there stated that this man Sobha had left his home and was living as an outcaste and leper on the banks of the Ganges. A man suffering from a virulent type of leprosy would naturally leave his home and take up his residence somewhere outside his village. It does not seem to have formed any part of the plaintiff's case in the courts below that Sobha had renounced the world and had adopted the life and status of a Hindu ascetic. The fact that he executed the sale deed in suit in satisfaction of a debt previously contracted by him shows in itself that he retained an interest in mundane affairs and did not consider himself to have renounced all his rights to his property. We do not think that the order of the Commissioner can be supported upon this or upon any other ground.

Our answer therefore to this reference is that in our opinion the Commissioner should have dismissed the second appeal preferred to his court, and that the costs of the entire proceedings, including this reference, should be borne by the unsuccessful plaintiff. The petitioner, that is to say, the original defendant in the suit, should be allowed to charge pleader's fee in this Court at the rate actually certified.

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REVISIONAL CRIMINAL.

Before Mr. Justice Tudball

EMPEROR v. BAIJAWAL SINGH *

Criminal Procedure Code, section 250—F frivolous or vexatious accusation—

Compensation—Against whom order for compensation can be made,

It is not necessary that the person against whom an order for compensation under section 250 of the Code of Criminal Procedure is made should be the person who himself gives information to a Magistrate in consequence of which another is accused of an offence provided that he is the person upon whose information an accusation is made.

THE facts of this case were as follows :—

One Jagmohan Dom gave information to the Revd. G. Spooner of the Wesleyan Mission to the effect that the accused constable had extorted from him the sum of Rs. 10. The Revd. G. Spooner made an inquiry on his account and then reported the matter to

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* Criminal Reference No. 868 of 1917.

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the District Magistrate. The District Magistrate thereupon directed the prosecution of the constable. The court trying the case found the charge frivolous, acquitted the accused, and directed Jagmohan to pay compensation. The District Magistrate referred the case to the High Court with the recommendation that the order passed under section 250 of the Code of Criminal Procedure by the trying Magistrate should be set aside on the ground that it did not appear to him to be legal.

The parties were not represented.

TUDBALL, J.—The District Magistrate of Benares has referred the case to this Court with the recommendation that the order passed under section 250 of the Criminal Procedure Code, directing Jagmohan Dom to pay Rs 10 as compensation to the police constable be set aside. Jagmohan Dom gave information to the Revd. G. Spooner of the Wesleyan Mission to the effect that the accused constable had extorted from him the sum of Rs. 10. The Revd. G. Spooner made an inquiry on his account and then reported the matter to the District Magistrate. The District Magistrate thereupon directed the prosecution of the constable. The court trying the case found the charge frivolous, acquitted the accused, and directed Jagmohan to pay compensation. The Magistrate in his reference merely states that the order does not appear to him to be legal. He does not give any grounds for his belief or opinion. Section 250 says "that if in any case instituted upon information given to a Magistrate, a person is accused of any offence before a Magistrate and the Magistrate by whom the case is heard, discharges or acquits him and is satisfied that the accusation against him was frivolous or vexatious, the Magistrate may, in his discretion, direct the person upon whose information the accusation was made to pay compensation to the accused." The question, therefore, is whether it was upon the information of Jagmohan Dom that the accusation against the constable was made. The information in the present case no doubt was conveyed to the District Magistrate through the Revd. G. Spooner. If Jagmohan Dom gave the information to the Missionary with the intention that it should be conveyed to the District Magistrate with a view to a

prosecution, then clearly Jagmohan Dom was the person upon whose information the accusation was made. The mere fact that he utilized the Missionary for the purpose of conveying the information to the District Magistrate cannot protect him. If on the other hand he merely in conversation told the Missionary about the case without any desire for or view to a subsequent prosecution or to the conveyance of the information to the District Magistrate, then he was hardly liable for the intervention of a busy body who took it upon himself to make a complaint to the District Magistrate. In this latter circumstance it would be the Revd. G. Spooner who would be liable to pay compensation. I have examined the letter sent by the Missionary to the District Magistrate, and that letter is sufficient to show that Jagmohan did intend to make a complaint with a view to securing the punishment of the constable. It clearly, therefore, was upon his information that the accusation against the constable was made in court before the trying Magistrate. In these circumstances I do not think that the order passed was illegal. Let the record be returned.

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APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Chaudhary.

NARAIN DEI (APPLICANT) v. PARMESHWARI AND OTHERS (OPPOSITE PARTIES) *

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Act No. VII of 1889 (Succession Certificate Act), sections 7 and 9—Certificate of succession—Security—Application by widow of separated Hindu

Where, under section 9 of the Succession Certificate Act, 1889, the requiring of security is optional, security should not be taken from the widow of a separated Hindu asking for a certificate to enable her to collect debts due to her husband, in the absence of special circumstances rendering the taking of security necessary.

In this case one Musammat Narain Dei made an application under Act VII of 1889, for a succession certificate to collect certain debts due to her husband. The reversioners of the deceased objected to the granting of the certificate till some security was furnished to safeguard their interest. The lower court allowed

* First Appeal No. 69 of 1917, from an order of Muhammad Ali, District Judge of Moradabad, dated the 8rd of April, 1917.

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the objection and asked the widow to furnish security. The widow expressed her inability to comply with the court's order and thereupon the District Judge rejected her application, holding that, under section 7, sub-section (3), as read with section 9, of the Succession Certificate Act, 1889, it was compulsory for the applicant to furnish security. The applicant appealed

Pandit *Radha Kant Malaviya*, for applicant :—

This is not a case in which security ought to be demanded. Section 7, clause (3), of Act VII of 1889 refers to rival claimants. The interest of the reversioners was merely contingent and they had no immediate claim to the money. The order of the Judge was evidently under section 7, clause (2), where the security was merely optional. The reversioners cannot stop the widow from realizing any debt due to her husband, they can merely see that the money, when realized, is not wasted. Besides, they could not realize the debts themselves. The result of this obstruction would be that the debts would become time-barred. Some had become time-barred already. They were ruining the widow without personal gain. In *Jai Dei v. Banwari Lal* (1) the lower court directed that the widow should merely get the interest and this Court was of opinion that the order of the lower court was *ultra vires*.

The Hon'ble Maulvi *Raza Ali*, for the opposite party :—

The order demanding security, whether under section 7, clause (3), or clause (2), was a good order. Under clause (2), the court has jurisdiction to demand security "in any other case" and it has evidently exercised its discretion, which should not be interfered with. The reversioners have some interest in the money, at least they have a right to see that it is not wasted. The lady could not waste her immovable property, why should she be put in a better position as regards such a considerable amount; *Gauri Dutt v. Musammatt Maikia* (2). If no security is demanded, how did the court propose to safeguard the interest of the reversioners. The widow had a fixed income. She had no need for such a considerable amount. Security should be demanded under section 9. The appellate court generally does not interfere with the discretion of the lower court. In the case of

(1) (1918) I. L. R., 35 All., 249. (2) (1905) 2 A. L. J., 606.

Jai Dei v. Banwari Lal (1) relied on by the other side, the widow was made liable to render accounts to the court. If some such arrangement be made in this case too the objectors will be quite satisfied.

RICHARDS, C. J., and BANERJI, J.:—This appeal arises out of an order of the District Judge rejecting the application of the appellant for a certificate to collect debts under Act VII of 1889. Umrao Singh was the husband of the appellant. He died leaving (1) his widow, (2) the wife of a predeceased son, and (3) certain reversioners him surviving. The application of the widow was opposed by the reversioners and the daughter-in-law. An order was made by Mr. ALLEN granting a certificate conditional upon the widow giving security to the extent of the debts covered by the certificate which was asked for. There appears to have been some allegation by the opposite party that the debts due to the deceased were greater than those mentioned in the application. The lady expressed her inability to give security, and eventually her application was rejected. The learned District Judge who finally rejected her application seems to have been of opinion that the first order made by Mr. ALLEN was under section 7, clause (3), of the Succession Certificate Act and that accordingly the court had no option but to require security to be given. In the present case it is clear that the widow was the person entitled to a succession certificate, and that the order of Mr. ALLEN was not made under section 7, clause (3). Section 9 deals with the powers of the court as to directing security. It provides that the District Judge shall in any case in which he proposes to proceed under section 7, clause (3), or clause (4), require that security must be given by the person to whom the certificate is granted. The court has also discretion in any other case to require security to be given. The real question which we have to decide in the present case is whether or not, when a widow is admittedly entitled to the certificate and all the moneys covered by the succession certificate are assets of her deceased husband, she ought to be called upon to give security. It is not alleged in the present case that there are any exceptional circumstances. There is the mere fact that she is the widow and a *purdah nashin* lady. It seems

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to us quite clear that if the deceased had died leaving a sum of money equal to the debts in his house, or if the widow had been successful in collecting a similar amount after the death of her husband, the reversioners would not be listened to if they came into court asking that the widow's rights as a Hindu widow should be restrained in any way for the benefit and protection of the reversioners, on the mere allegation that she might waste the *corpus*. If this view be correct, it seems to us that there is no reason why the reversioners should get exactly the same relief by compelling the widow to find security as a condition precedent to getting a certificate to collect debts. We do not say that there may not, in some cases, be special circumstances which might justify the court in directing security to be given even in the case of a Hindu widow. We allow the appeal, set aside the order of the court below and direct that the certificate do issue to the appellant. The appellant must have her costs paid by the respondents in all courts.

Appeal allowed.

REVISIONAL CRIMINAL.

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Before Mr. Justice Tudball

EMPEROR v. HARAK CHAND MARWAHI.*

Act No XLV of 1860 (Indian Penal Code), section 266—Possession of false measure—Intent—Acquittal—Criminal Procedure Code, section 488—Practice

It being in evidence that in the village where the accused carried on the business of a cloth-seller the usual standard of measurement was 35½ inches, it was held that a conviction under section 266 of the Indian Penal Code in respect of the possession of such a measure of length could not be sustained.

Held also that the High Court will not as a rule entertain a reference by a Sessions Judge having for its object the reversal of an acquittal, when the Government has a right of appeal, more particularly when the matter is one, such as a question of correct weights and measures, in which the Government may be considered to be peculiarly interested.

THE facts of this case were as follows :—

One Harak Chand was prosecuted on two charges under section 266 of the Indian Penal Code before a Magistrate in respect to two measures of length which he was using in his shop. The

* Criminal Reference No. 759 of 1917

one measure was 35 inches, and the other measure was 35½ inches long. The Magistrate who tried the case came to the conclusion that in the village where these persons live and sell their wares the prevailing standard of measurement was a yard of 35½ inches long. In respect to the one measure he therefore convicted Harak Chand and in respect to the other measure he acquitted him on the ground that fraudulent intent was not proved. He appealed against the conviction. The Sessions Judge altered the conviction from one section to another but maintained the sentence.

With regard to the charge on which the accused was acquitted the Sessions Judge referred the case to the High Court with the recommendation that the order of acquittal should be set aside and that the accused should be convicted under section 266 of the Indian Penal Code.

The Crown was not represented.

Mr. W. Wallach and Munshi Iswar Saran, for the opposite party.

TUDBALL, J.—Criminal Reference Nos. 757, 758 and 759 are all similar and more or less connected with each other. One Harak Chand was prosecuted on two charges under section 266 of the Indian Penal Code before a Magistrate in respect of two measures of length which he was using in the shop. The one measure was 35 inches, and the other measure was 35½ inches long. The Magistrate who tried the case came to the conclusion that in the village where these persons live and sell their wares the prevailing standard of measurement was a yard of 35½ inches long. In respect to the one measure he therefore convicted Harak Chand and in respect to the other measure he acquitted him on the ground that fraudulent intent was not proved. He appealed against the conviction. The Sessions Judge altered the conviction from one section to another but maintained the sentence. In regard to the charge on which the accused has been acquitted, the learned Sessions Judge has sent the record to this Court with the recommendation that the order of acquittal should be set aside and the accused be convicted under section 266 of the Code. I have read the order of reference. There are two points in the case. In the first place the Government has a right of appeal against the order of acquittal. This Court has

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always been loth to take up in revision cases of this description which have not been brought before it on appeal by the Local Government. In the present case it is really a public prosecution by a public official which has taken place. It is a matter in which Government is concerned and it is open to the District Magistrate to lay the matter before the Local Government with a view to an appeal being filed if necessary; the matter being one of more or less public importance. In the second place I have read the learned Sessions Judge's opinion as expressed in his order of reference and I have considerable doubts as to the correctness thereof. A necessary ingredient of an offence under section 266 is fraudulent intent. One knows full well that the measures of weight and measures of length which are in use in this country in villages and towns differ considerably from the standard measures laid down by Government under Act II of 1889. Where both purchaser and seller are well aware of the actual measure being used, there can be no question of fraudulent intent. It is only when the seller purports to sell according to a certain standard and sells below that standard, that he can be said to be guilty of fraud. The case in my opinion is one which this Court ought not to take up in revision but one in which if it is necessary the Local Government may appeal if it deems fit. Let the record be returned.

Record returned.

APPELLATE CIVIL.

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Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

DAMBAR SINGH (DECREE HOLDER) v. MUNAWAR ALI KHAN
AND ANOTHER (JUDGMENT-DEBTORS) *

Act No. III of 1907 (Provincial Insolvency Act), section 18—Decree obtained by insolvent before adjudication—Attachment of decree—Effect of subsequent adjudication on right of attaching creditor to execute.

Where a decree has been attached by a creditor of the decree-holder and subsequently the decree-holder is adjudged an insolvent, the right to execute such decree vests in the receiver in insolvency, and is not retained by the attaching creditor. *Raghunath Das v Sundar Das Khetri* (1) referred to.

* First Appeal No. 155 of 1916, from a decree of Abdul Hasan, Subordinate Judge of Meerut, dated the 3rd of May, 1916.

(1) (1914) I. L. R., 42 Cal., 72.

ONE Sri Kishan Das obtained a decree against Munawar Ali and another on the 1st of December, 1904. Dambar Singh held a decree against Sri Kishan Das and in execution thereof attached the decree held by Sri Kishan Das. As attaching creditor he applied to execute the decree of Sri Kishan Das on the 12th of July, 1907, again on the 30th of March, 1908, and again presented the present application on the 3rd of June, 1913. Sri Kishan Das was adjudicated an insolvent on the 26th of September, 1913, by the Bombay High Court and the official assignee was appointed receiver. The judgment-debtors objected that after Sri Kishan Das's insolvency, Dambar Singh had no right to execute the decree. The court allowed the objection and dismissed the application. Dambar Singh appealed.

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Babu *Piari Lal Banerji*, for the appellant.

The attachment of the decree was made under section 278 of the Code of Civil Procedure, 1882. Under the provisions of that section the effect of the attachment was to take away the right to execute the decree for Sri Kishan Das and to vest it solely in Dambar Singh. The provisions of the present Code, order XXI, rule 53, made no material difference; *T. Unni Koya v. A. P. Umma*, (1). The subsequent insolvency of Sri Kishan Das could not give to the receiver the right to execute the decree which by the attachment had been taken away from Sri Kishan Das and had become vested in Dambar Singh. The right to proceed further with the execution of the decree which he had attached remained with Dambar Singh notwithstanding the insolvency of Sri Kishan Das.

Dr. *S. M. Sulaiman* (for Mr. *Abdul Raoof*), for the respondent.

Under section 53 of the Presidency Insolvency Act corresponding to section 34 of the Provincial Insolvency Act, it is only in respect of assets realized before the insolvency, that the appellant could have any right as against the receiver. The attachment gave to the appellant no lien or charge over the insolvent's property and the receiver in insolvency took all the property as if no attachment had taken place. The Privy Council has recently considered the effect of an attachment by a

(1) (1912) L. L. R., 35 Mad., 622.

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creditor as against the rights of the receiver. He cited *Raghunath Das v. Sundar Das Khetri*, (1).

Babu *Piarn Lal Banerji*, in reply.

The Privy Council considered the case of an attachment of ordinary property. Under such attachment, the decree-holder secured no right over the property, but the judgement-debtor was merely prevented from alienating the property. When a decree is attached, the attaching creditor not only secures a right to prevent his debtor from executing the decree, but secures a substantive right to execute the decree himself, that is, he gets the sole right to deal with the debtor's property. In the one case the judgement-debtor is merely subjected to a disqualification and the receiver in insolvency takes the entire property without the disqualification, but in the other case the attaching creditor has secured the sole right to execute the decree, and though the receiver in insolvency may not be subject to the debtor's disqualification, he cannot take what by statute has already vested in the attaching creditor. No question under section 53 of the Presidency or section 34 of the Provincial Insolvency Act, arises at the present stage. Such question would only arise when after the realization of money the receiver claimed it as against the appellant. At the present stage the only question is "who has the right to execute the decree." In any case, the entire application could not be dismissed, as it included items of costs allowed to the appellant on account of the previous executions.

RICHARDS, C. J., and BANERJI, J.:—One Sri Kishan had obtained a certain decree. The appellant here obtained another decree against Sri Kishan and attached the decree belonging to Sri Kishan. Sri Kishan was declared an insolvent and his property vested in the official assignee. Notwithstanding the adjudication of Sri Kishan the appellant sought to put into execution the decree belonging to Sri Kishan which he had attached in execution of his decree. The judgement-debtors objected that Dambar Singh was not competent to execute the decree. The court below held that the objection had force and dismissed the application. We think the decision appealed from is correct. The effect of the attachment obtained by the appellant was not to

(1) (1914) I. L. R., 42 Cal., 72.

vest in him any property. It gave him, no doubt, the right to execute the attached decree, and had it not been for the insolvency he would still have that right. The insolvency, however, vested all the property of the insolvent in the official assignee and in effect cancelled the attachment obtained by Dambar Singh. Once Sri Kishan was declared an insolvent, the official assignee was the only person who could execute the decree which Sri Kishan had obtained, unless the official assignee had, in realizing the estate, sold the decree to some third party. See the decision of their Lordships of the Privy Council in *Raghunath Das v. Sundar Das Khetri* (1).

In the third ground in the memorandum of appeal the appellant contends that the court below has also dismissed his application to recover certain costs which were no part of the decree belonging to Sri Kishan, but which were in fact awarded to him as costs of previous execution proceedings. We think that this objection may have force. If any costs were awarded to Dambar Singh personally against the judgement-debtors, those costs form no portion of the assets of Sri Kishan and accordingly never vested in the official assignee. Save as just mentioned we dismiss the appeal, but in doing so expressly state that the dismissal of the appeal is not to prejudice the right of the appellant (if he has any) to recover costs which were personally awarded to him. We make no order as to costs of the appeal. The order of the court below as to costs in that court will stand.

Decree varied.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Chanan Banerji.

MATHURA PRASAD AND ANOTHER (JUDGEMENT-DEBTORS) v.
SHEOBALAK RAM (DECREE-HOLDER).*

Act No. II of 1912 (Co-operative Societies Act), sections 42 (5) and (6)—Order of liquidator declaring each member to be jointly and severally liable—Application for enforcement of order by Civil Court—Appeal—Jurisdiction.

A society formed under the Co-operative Societies Act, 1912, went into liquidation. The liquidator, having taken mortgages from the various persons

* Second Appeal No. 1086 of 1916, from a decree of H. M. Nanavutty, District Judge of Benares, dated the 12th of January, 1916, modifying a decree of Udit Narain Sinha, Subordinate Judge of Benares, dated the 9th of October, 1915.

(1) (1914) L. L. R., 42 Calc., 72.

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who were members of the society and had received advances, proceeded to make an order, purporting to be passed under section 42 (b) of the Act determining that each of the debtors should be jointly and severally liable for the full amount of the several debts. This order was then taken to the Civil Court having local jurisdiction to be enforced under section 42 (5) (a).

Held that the liquidator was probably wrong in passing the order which he did, but that, the order being one within section 42 of the Act, the Civil Court had no option but to enforce it and that no appeal lay to the District Judge nor a second appeal to the High Court.

THIS was an appeal arising out of an application to enforce an order under section 42 of the Co-operative Societies Act, II of 1912. The appellants were members of a society registered under the Co-operative Societies Act. The Registrar cancelled the registration of the society and appointed the respondent liquidator. The liquidator ascertained the amount of indebtedness of each member to the society and accepted a mortgage from each member to cover the amount of the latter's individual indebtedness. He then purported under section 42 (b) of the Act to pass an order declaring each member jointly and severally liable for the total indebtedness of all the members and applied under section 42 (5) to the Subordinate Judge to enforce the order by attachment and sale of the property of the members hypothecated and also other property. The appellants objected that the liquidator could not impose a joint liability on them for the debts of other members. The Subordinate Judge held that even if the liquidator had passed a wrong order he was bound to enforce it and disallowed the objections. On appeal the District Judge agreed with the Subordinate Judge, but held that the liquidator could not proceed against the mortgaged property, but could only proceed against the other property of the members. The objectors preferred a second appeal.

Babu Piari Lal Banerji, for the appellants :—

The Civil Court when invoked by the liquidator to enforce his order was not bound to enforce it without considering whether the order was one which the liquidator could pass. Section 42 (5) only allowed an *order passed under the section* to be enforced. It was therefore open to the Civil Court to inquire whether the order imposing a joint liability on the appellants for the debts of other members was an order which it was competent to the liquidator to pass. Under section 42 (2) (b), the liquidator was

empowered to determine the contribution to be made by each member. This was done by the liquidator before he accepted the mortgages. Under clause (c) he was empowered to give such directions regarding the collection of the debts as appeared to him necessary. This he did by accepting mortgages from the several members. It was not open to him after that to ignore the mortgages and impose a fresh and additional liability not warranted by law. The members were only liable to the society to the extent of their individual debts. It was only with respect to the debts of the society *qua* a third party, for example a Central or a District Bank, that the members would be jointly and severally liable. The portion of the order now sought to be enforced was therefore beyond the powers of the liquidator and consequently not one under the section and the Civil Court should not have refused its aid.

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The Hon'ble Dr. Tej Bahadur Sapru, for the liquidator, respondent :—

The order of a liquidator under the Act is final. It is not open to appeal and the appellant in the guise of an objection to the enforcement of the order is really seeking to appeal against the order. The functions of a court under section 42 (5) are really those of an executing court, and as such it could go behind the decree which in this case is the order of the liquidator. The liquidator has in effect determined the liability of the members, and even if he has wrongly imposed a greater liability than the Act allows, that would not make his order without jurisdiction so as to enable the Civil Court to ignore it. The wide scheme of the Act showed that the courts should have no power to question the acts of the liquidator. Moreover, the Act only provided that the court should enforce the order of the liquidator in the same manner as if it were a decree. It did not make the order of the court appealable, and consequently no appeal lay to the District Judge and no second appeal to the High Court.

Babu Piari Lal Banerji, in reply :—

An order of the court when passed would be subject to appeal in the same way as order passed by a court executing a decree. The Registrar is not given any powers by way of appeal or revision. He could only express his opinion. As this Act was

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clear one, this Court should express its opinion for the guidance of the liquidator.

RICHARDS, C. J., and BANERJI, J.:—This appeal arises under the following circumstances. There was a society registered under the Co-operative Societies Act, II of 1912. The society got into debt. Its registration was cancelled and a liquidator appointed. There were a number of persons who were members of the society and had received advances. The liquidator took mortgages from each of the debtors for the amount of their liability. He then proceeded to make an order which purported to be under section 42 (b), determining that each of the debtors should be jointly and severally liable for the full amount of the several debts. This order was sought to be enforced in the Civil Court having local jurisdiction under the provisions of section 42 (5) (a). The court ordered execution. On appeal to the District Judge the appeal was dismissed. A second appeal has now been preferred to this Court. It is strongly contended on behalf of the appellants that the order of the liquidator was bad. It is said that, while the liquidator had a perfect right to determine the "contributions" to be made by the members of the society, he could not make them jointly and severally liable for each other's debts, more particularly where, as in the present case, he had taken a mortgage from each of the debtors for the amount of his debt. On the other side, it is objected that the Subordinate Judge was bound to execute the order of the liquidator and that he could not consider whether that order was right or wrong, that no appeal lay to the District Judge and that no second appeal lies to this Court. We think all these objections have force. If the order of the liquidator can possibly be said to be an order under section 42, then the Subordinate Judge being the Civil Court mentioned in sub-section (5), clause (a), had no option but to enforce the order. It seems to us clear that no appeal lies save appeals expressly given by the Act and that no second appeal lies to this Court. It is quite clear that the policy of the Act was that matters arising under the Act should be settled without litigation in the courts. If litigation were permitted, the whole object of the Co-operative Societies Act would be defeated. We think that in the present case we

may depart from our usual practice of not saying anything which is not absolutely necessary for the decision of the case because we are all interested in the good working of the Co-operative Societies Act. It seems to us that probably the liquidator was wrong in passing an order that each of these debtors should be jointly and severally liable for the amount of each other's mortgages. If he required money for the purposes of liquidation and for the discharge of the debts of the society, he had clear power to determine the contributions to be made, and we think that it would have been more correct had he made his order in this form and then proceeded to take steps to recover from each mortgagor the amount of his mortgage. We dismiss the appeal. The liquidator will get his costs in this appeal as part of his costs in the liquidation. The appellants will pay their own costs.

Appeal dismissed.

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RAM

MISCELLANEOUS CIVIL.

Before Mr. Justice Tudball.

LAKHAN SINGH (PLAINTIFF) v RAM KISHAN DAS (DEFENDANT).*

Act No. VII of 1870, (Court Fees Act) Schedule I, Article 1—Court fee—

Cross-objection filed in an appeal.

Under article 1 of schedule I to the Court Fees Act, 1870, a party filing cross-objections must pay an *ad valorem* fee according to the value or amount of the subject matter in dispute.

Office Report.

STAMP insufficient by Rs. 20-12-0, i.e., Rs. 8 in respect of the relief decreed against the defendant respondent and Rs. 12-12-0 in respect of the plea as to costs amounting to Rs. 166-8-0.

Objection from Babu *Priya Nath Banerji*:—I object to this report. On the first point, the suit was instituted by the plaintiff on a ten rupee stamp. The plaintiff has appealed on a ten rupee stamp, i.e., he has paid the full stamp duty. Therefore I am not bound to pay another stamp duty.

On the second point I do not ask any particular amount on account of costs. My objection is that the order about costs is a wrong order. I am therefore not liable to pay stamp duty.

* Stamp Reference in First Appeal No. 186 of 1917.

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Office Report.—In reply to the objection to the stamp report taken by the learned counsel for the defendant objector respondent I beg to submit very briefly as follows :—

The petition of cross-objection filed by the defendant respondent under order XLI, rule 22, of the Code of Civil Procedure, relates to the portion of the claim decreed against the said defendant respondent. The suit being of a declaratory nature a court fee of Rs. 10 was paid on the plaint and the same amount is payable on the cross-objection. The mere fact that the plaintiff has paid full court fee on the appeal is no reason why the defendant should not pay the requisite court fee on the cross-objection. Under the new Code of Civil Procedure (Act No. V of 1908), court fees are payable on the cross-objection in the same way as on the memorandum of appeal.

The plea as to costs as amended does not in the least affect the report as to the deficiency due on that plea. In this connection I rely on a ruling in 12 Oudh Cases at page 171.

Taxing Officer's Report.

On the question of costs it is clear that the court fee is deficient. The applicant is seeking to avoid a definite liability to pay a definite sum of money. The vagueness of the language of the memorandum of appeal cannot disguise the clear fact, and an *ad valorem* court fee on the amount of costs must be paid. There is therefore a deficiency of Rs. 12-12-0; on the other question as to the court fee to be paid on a cross-objection which seeks to set aside a declaration I am not so certain, and I therefore refer the question for the orders of the Taxing Judge.

Taxing Officer's Report.

In this case the original suit was one for a declaration, and was decreed in part and dismissed in part. The plaintiff has appealed asking for that portion of the declaration which was denied him, and paying a court fee of Rs. 10. The defendant has filed a cross-objection, on a stamp of Rs. 2 asking to have the portion of the declaration which was granted set aside. Office have reported that a court fee of Rs. 10 should have been paid on the cross-objection. The argument is based on the analogy of article 1 of schedule I of the Court Fees Act. If a suit susceptible of an *ad valorem* court fee is decreed in part and dismissed in part, the

memorandum of appeal and the cross-objection must each pay an *ad valorem* fee for the respective parts of the original subject matter with which they deal. Office argues, and correctly, that the action of the lower court has split up the original declaration sought into two, one of which has been granted, and the other denied. The plaintiff, it is urged, is seeking to secure that which has been denied, the defendant to have set aside that which was granted. Therefore both must pay the court fee requisite on a declaration. This argument is sound, but it ignores the fact that, while article 1 of schedule I definitely mentions a memorandum of cross-objection, article 17 of schedule II as clearly does not do so, and I do not think we are entitled to hold that in that article memorandum of appeal includes memorandum of cross-objection. The point, however, is not absolutely clear, and I refer it for your orders.

The following order was passed by the Taxing Judge.

TUDBALL, J.—In this case the plaintiff brought a suit asking for certain declarations. The suit was partly decreed and partly dismissed. The plaintiff appealed against so much of his claim as was disallowed and he paid a court fee of Rs. 10. The defendant filed no appeal, but, on receiving notice of the plaintiff's appeal, he filed cross-objections on a stamp of Rs. 2. The taxing clerk made a report to the effect that the cross-objection should bear a court-fee stamp of Rs. 10 just as if the respondent had appealed, apparently applying the analogy of article 17, schedule II, of the Court Fees Act. The Taxing Officer is doubtful as to the accuracy of this and he has sent the case on to me as Taxing Judge for my decision. He has pointed out that the only place in the Court Fees Act in which cross-objections are mentioned is in article 1, schedule I, of the Act. Under that article the cross-objection must pay an *ad valorem* fee according to the value of the subject matter in dispute. Article 17, schedule II, though it relates to a plaint or memorandum of appeal in the classes of suits mentioned therein, does not relate to cross-objections filed in similar suits. This Act was amended when Act V of 1908 was passed and the words "or cross-objection" were added to article 1 of schedule I, but not to article 17 of schedule II. Under the former article the cross-objection must pay an *ad valorem* fee.

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according to the value or amount of the subject matter in dispute. In the present case the respondent has valued the relief which he seeks in his cross-objection at Rs. 1,000. He must, therefore, pay this large fee when the appellant in the case can appeal on payment of only Rs. 10. It appears to me that this is perhaps due to an oversight at the time when Act V of 1908 was passed in not adding the words "or cross-objection" to article 17 of schedule II. I allow the respondent three weeks within which to make good the deficiency.

APPELLATE CIVIL.

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Jul, 31.

Before Mr. Justice Muhammad Raftg and Mr Justice Piggott.

RAMZAN (PLAINTIFF) v. RAM DAIYA (DEFENDANT),*

Hindu Law—Mitakshara—Joint Hindu family—Hindu widow—Widow's right of residence in joint family house—Effect of alienation during the life-time of widow's husband.

When a right of residence or maintenance comes into existence in favour of the widow of a man who was lately a member of a joint Hindu family, she takes that right in the property as it stands at the time of her husband's death. She cannot set up her right of maintenance or residence as against alienations effected during the life-time of her husband. *Ajudhia Prasad v. Jasoda* (1) followed.

A widowed daughter-in-law is debarred from setting up the plea of the invalidity of an alienation effected by the father-in-law during her husband's life-time. *Sohni v. Mohan Kuer* (2) followed.

THE facts of this case were as follows :—

One Shankar and his son, Ram Charan, constituted a joint Hindu family. Shaunkar executed a simple mortgage of a dwelling house which was ancestral family property and in which, it appeared, the family resided. Some time after the mortgage Ram Charan died, leaving a widow, Musammam Ram Daiya. Thereafter the plaintiff appellant acquired by private purchase from Shankar a portion of the house. He also acquired the remaining portion by purchase at auction sale in execution of the decree which was obtained on the mortgage aforesaid. On

*Second Appeal No. 716 of 1916, from a decree of Ram Chandra Chaudhri, Officiating District Judge of Allahabad, dated the 2nd February, 1916, reversing a decree of Triloki Nath, Second Additional Munsif of Allahabad, dated the 5th of January, 1915.

(1) Weekly Notes, 1887, p. 279. (2) (1911) 9 A L.J., 23.

attempting to take possession of the house he was resisted by Musammat Ram Daiya. He brought a suit against her for possession, and the defence set up was that she had a right of residence in the family dwelling house in which she had been residing since her marriage and that the plaintiff was fully aware of the fact; that the mortgage was not executed for legal necessity and was not binding on her; nor was the decree passed on that mortgage, to which she was no party, binding on her. The court of first instance held that as the mortgage had been executed at a time when Ram Charan was alive, no right, available against the mortgagees, of residence in the house had become vested in the defendant; and on the authority of *Ajudhia Prasad v. Jasoda* (1) and *Sohni v. Mohan Kuer* (2) the court decreed the suit. The lower appellate court was of opinion that the criterion was whether the alienation was one which would have bound the husband of the defendant; and it remitted an issue as to whether the mortgage was for legal necessity or an antecedent debt and binding on the son. This issue was found in the negative, and the lower appellate court held that Musammat Ram Daiya's right of residence arose on her husband's death, there being at that time no valid hypothecation. The appeal was accordingly decreed. The plaintiff came to the High Court in second appeal.

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Dr. S. M. Sulaiman, for the appellant :—

The issue remitted by the lower appellate court did not arise, because the widow of a predeceased son possesses no interest in the property and is not entitled to raise the question of legal necessity for the debt contracted by the father; *Sohni v. Mohan Kuer* (2). Even upon the issue as remitted the court went wrong, inasmuch as it placed the burden of proving the nature of the debt upon the plaintiff. For, if the defendant's husband had now been alive, the burden of proving that the debt was of such a nature as he would not be liable as a Hindu son to pay would be upon him, the property having already passed out of the family by auction sale in execution of the mortgage decree against the father; *Debi Singh v. Jia Ram* (3). And it would not be necessary for the creditor to show that the debt was for the benefit of the family; *Babu Singh, v. Bihari Lal* (4)

(1) Weekly Notes, 1887, p. 279.

(2) (1911) 9 A. L. J., 23.

(3) (1902) I. L. R., 25 All., 214.

(4) (1908) I. L. R., 80 All., 156.

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Mata Din v. Gaya Din (1). An auction-purchaser need not prove the existence of legal necessity or even that he made inquiries as to the existence of any legal necessity; *Trevelyan on Hindu Law*, p. 296. The mortgage having been made in the life-time of the defendant's husband, her right of residence as that of a Hindu widow had not then accrued. The widow never acquired as against the mortgagees an absolute right of residence. The alienation was made before such a right had vested in her and she cannot resist the plaintiff's claim; *Ajudhia Prasad v. Jasoda* (2). A clear distinction, forming the basis of the decision, was drawn in that case between cases where the mortgage or other alienation is made before, and cases where it is made after, the right of residence becomes vested in the widow. The defendant did not even allege, much less prove, that the house in suit was the one and only house for the dwelling of the family.

Munshi *Gokul Prasad*, for the respondent:—

According to the texts of Hindu law-givers it is the bounden duty of every owner of property and of his successors to provide for the maintenance of dependents of the family, and he or they cannot alienate the property in such a manner as to defeat the right of maintenance of the dependent members; *Vyavastha Chandrika*: Book I, Part I, p. 256; *Smriti Chandrika*: (Translated by T. K. Iyer), Edn. 1867, p. 158, Ch. XI, Sec. 1. By marriage a Hindu female becomes such a member of the family, and her maintenance is obligatory on the members of the family who are in possession of the family property. This was laid down by the Allahabad High Court in *Musammatt Lalti Kuar v. Ganga Bishan* (3), where a father-in-law in possession of the family property was held to be bound to provide maintenance to the widow of a predeceased son. Under the Hindu Law the right of dependent members to reside in the family dwelling-house and their right to get maintenance are co-extensive and stand on the same footing; so that the right of residence of Hindu females is a paramount right which cannot be defeated by alienation by the owner of the property, and the alienee cannot turn them out; *Katyayana*: 2 Colebrooke's Digest, p. 133; *Mitra*: Law

(1) (1909) I. L. R., 81 ALL., 599. (2) Weekly Notes, 1887, p. 279.

(3) (1875) 7 N. W. P., H. C. Rep., 261

Relating to Hindu Widow, Edn. 1881, p. 466 ; *Mayne* : Hindu Law, 8th Edn., p. 644 ; *Ghose* : Hindu Law ; 3rd Edn., Vol I, p. 319 ; *Mangala Debi v. Dina Nath Bose* (1), *Jamna v Machul Sahu* (2), *Becha v. Mothina* (3).

This broad rule has, however, been qualified by case-law to this extent that an alienation made for the purposes of averting a calamity or for legal necessity will override the rights of maintenance and residence of the female members, just as it will override the proprietary right of all the coparceners themselves ; *Ramanadan v Rangammal* (4). The existence of legal necessity for the alienation being the criterion for deciding whether the right of residence of the female members is affected by the alienation, the lower appellate court was right in remitting the issue it did. And the *onus* was rightly laid on the plaintiff, for it is upon a person dealing with a qualified owner to prove the existence of legal necessity ; *Sahu Ram Chandra v. Bhup Singh* (5).

The auction purchaser who derives title from the mortgagee has no higher rights than the latter. Further, the facts of the present case show that the auction purchaser was not a *bona fide* purchaser without notice, but was aware of the widow's right of residence in the house he was purchasing, and this apart from the rule laid down in the case of *Ramanadan v Rangammal* (4) that in such cases the purchaser may always be presumed to have had notice. The finding on the issue being that there was no legal necessity for the mortgage the right of residence of the defendant is paramount over the right of the auction-purchaser and the defendant cannot be ousted by him ; *Gauri v. Chandramani* (6). The case of *Ajudhia Prasad v. Jasoda* (7) relied on by the appellant is distinguishable. There the alienation was made by all the members of the family, so that no question of legal necessity could arise, while here the mortgage was made by the father alone in the life-time of his son. Should that case, however, be regarded as laying down the broad proposition that the right of residence does not vest in a female member of a joint Hindu

(1) (1889) 4 B. L. R., 72. (O. C. J.) (4) (1888) I. L. R., 12 Mad., 260.

(2) (1879) I. L. R., 2 All., 315. (5) (1917) I. L. R., 39 All., 437.

(3) (1900) I. L. R., 23 All., 85. (6) (1876) I. L. R., 1 All., 262

(7) Weekly Notes, 1887, p. 279.

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family till she becomes a widow, the case would be opposed to the texts and authorities. From what has already been submitted it follows that the right of residence is not a right peculiar to a widow but is one which attaches to every Hindu female from the moment she becomes a member of the family by her marriage. This right is not in any way enlarged by her becoming a widow. The only point of difference between the right of a wife and that of a widow in the matters of maintenance and residence is that a wife has an additional right, available against her husband alone, of getting maintenance and residence irrespective of his possession of any property. Her right against the other co-parceners and the widow's right against the surviving co-parceners are equal and are dependent on such co-parceners being in possession of family property; *Surampalli Bangaramma v. Surampalli Brambaze* (1). The point decided in *Sohni v. Mohan Kuer* (2), relied on by the appellant, does not touch the facts of the present case. There the widow was setting up a right of ownership in herself through her husband, and it was rightly held that, her husband's share having lapsed by survivorship to the other co-parceners, there was no interest in the property outstanding which the widow in right of her husband could seek to protect by raising the plea of absence of legal necessity. She was not claiming a right of residence as a Hindu widow. In the present case the defendant is not seeking to claim for herself any right derived from her husband in the property. She is not claiming *through* him; she is claiming an independent right which the Hindu Law confers on her as a Hindu female, and which she could have enforced *against* her husband.

Dr. S. M. Sulaiman, was not heard in reply.

MUHAMMAD RAFIQ and PIGGOTT, JJ. :—This second appeal by the plaintiff in a suit for ejectment arises under the following circumstances :—

There was a joint Hindu family consisting of a father, Shankar, and his son, Ram Charan. Shankar mortgaged a certain house which formed part of the ancestral family property, and in which it would seem that he and his son were residing, although it is not clear that this point has been specifically considered by the

(1) (1908) I. L. R., 81 Mad., 838. (2) (1911) 9 A.L.J., 23

courts below, by a simple mortgage in favour of one Musammat Dhan Devi. Ram Charan died, after this mortgage had been contracted, leaving him surviving a widow, Ram Daiya, who is the defendant respondent in this case. Shankar subsequently sold a $\frac{2}{3}$ share of the house in question to the plaintiff, Ramzan. The latter induced the mortgagee to accept redemption of this share on payment of $\frac{2}{3}$ of the mortgage debt. After this Musammat Dhan Devi, the mortgagee, brought a suit for sale against Shankar, who had now become by survivorship the sole owner of the entire house. She obtained a decree for the sale of the remaining $\frac{1}{3}$ share of the house in satisfaction of $\frac{1}{3}$ of the original mortgage debt. This decree the plaintiff, Ramzan, who had already become the owner of the remaining $\frac{2}{3}$ share of the house, purchased from Musammat Dhan Devi. He took out execution, brought this $\frac{1}{3}$ share to sale and purchased it himself. On attempting to take possession of what he had purchased he was resisted by the defendant Musammat Ram Daiya. Hence this present suit, in which the plaintiff claims actual possession of the share of the house purchased by him at the auction, along with an injunction restraining the defendant from interfering with his possession. The suit has been resisted simply on the ground of defendant's right of residence in the ancestral family house as a Hindu widow. The first court overruled this contention and decreed the claim. The learned District Judge held that the question of the defendant's right of residence depended on the question whether or not the original alienation, that is to say, the mortgage by Shankar of the entire house, had been made for legal necessity. He remitted an issue on this point, and on receiving a finding that legal necessity was not proved, he has dismissed the plaintiff's suit altogether. The plaintiff comes to this Court in second appeal. The decision of the lower appellate court is certainly unfair to the plaintiff to some extent, as the latter was at least entitled to formal possession subject to the alleged right of residence of the defendant for her life-time. On the decree of the lower appellate court as it stands, it is difficult to see how the plaintiff can ever enforce his proprietary rights hereafter. We are asked, however, by the plaintiff to consider the question whether his suit ought not to have been decreed as brought. In our opinion it ought to have

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been decreed. We have been referred to a great deal of case-law on the subject of a Hindu widow's right of residence and maintenance. It is unnecessary to go into the principles laid down by these decisions. The point in the present case is that, at the time of the original alienation from which the present plaintiff eventually derives his title, that is to say, the mortgage by Shankar of the entire house, the present defendant was not a Hindu widow. She was the wife of Ram Charan and was living with him and with her father-in-law. The decision of this Court in the case of *Ajudhia Prasad v. Jasoda* (1) shows the distinction to be drawn between an alienation effected to the prejudice of existing rights of maintenance and residence in favour of widowed ladies depending upon a joint family, and an alienation effected by the male members of a family in connection with which a right of residence or maintenance is set up by a lady who was bound at the time by the action of her husband and who claims to have become entitled to residence or maintenance, since the date of the alienation, by reason of her husband's death. Some of the arguments addressed to us on behalf of the respondent in this case have really called in question the correctness of this decision. We can only say that we are not prepared to re-consider it. It seems reasonable to say that, when a right of residence or maintenance comes into existence in favour of the widow of a man who was lately a member of a joint undivided Hindu family, she takes that right in the property as it stands at the time of her husband's death. She cannot set up her right of maintenance or residence as against alienations effected during the life-time of her husband. Now what the learned District Judge has called upon the plaintiff to prove in the present case is that the mortgage effected by Shankar was binding upon his son Ram Charan. This is precisely the plea which a Bench of this Court refused to allow a widowed daughter-in-law, in the position of the present defendant, to set up in the case *Sohni v. Mohan Kuer* (2). If the defendant cannot plead that the alienation made by Shankar did not bind Ram Charan, that is to say, did not affect the rights of Ram Charan in the house in question, then it is impossible to see why she should not be just as much bound by the alienation as she

¹ Weekly Notes, 1887, p. 279. (2) (1911) 9 A. L. J., 23.

would have been if Ram Charan had concurred in making it. The issue remitted by the learned Judge raised a question which might have been litigated upon an objection taken by Ram Charan himself, but which this Court refused to allow to be taken by a person in the position of Ram Charan's widow. We must hold, therefore, that the principle of the decision in *Ajudhia Prasad v Jasoda* (1) governs the present case, and, as we are not prepared to dissent from it or re-consider it we must allow this appeal. We do so accordingly. We set aside the decree of the lower appellate court and restore that of the court of first instance, with costs throughout.

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Appeal allowed.

APPELLATE CRIMINAL.

Before Justice Sir Pramada Charan Banerji.

EMPEROR v. CHANDAN SINGH AND OTHERS*.

Act No. XLV of 1860 (Indian Penal Code), sections 304 and 325—Assault committed by three persons armed with lathis—Intention—Culpable homicide—Grievous hurt.

1917,
October, 1

Three persons attacked a fourth with *lathis* and death ensued through a fracture of the skull of the person so attacked. There was, however, no evidence to show that the common intention of the assailants was to cause death or which of them actually struck the blow which fractured the skull of the deceased.

Held that the offence of which the assailants were guilty was that of causing grievous hurt and not that of culpable homicide not amounting to murder. *Emperor v. Bhola Singh* (2) followed.

THE facts of this case were as follows :—

One Girdhar Singh was attacked when seated at his *chaupal* by three persons, who had enmity with him, armed with *lathis*. These persons knocked down Girdhar Singh, as he was attempting to retreat into his house, which adjoined the *chaupal*, and inflicted various injuries. The skull was extensively fractured and Girdhar Singh died in consequence the same evening. It was not, however, clear from the evidence which of the assailants was actually responsible for the fracture of the skull. The

* Criminal Appeal No 668 of 1917, from an order of W. F. Kirton, Sessions Judge of Aligarh, dated the 28rd of July, 1917.

(1) Weekly Notes, 1887, p. 279.

(2) (1907) L. L. R., 29 All., 282.

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three assailants were convicted of the offence of culpable homicide not amounting to murder under section 304 of the Indian Penal Code, and sentenced each to ten years' rigorous imprisonment. They appealed to the High Court

The Government Pleader (Babu *Lalit Mohan Banerji*), for the Crown.

BANERJI, J.—The appellants have been convicted of having caused the death of one Girdhar Singh and each of them has been sentenced, under section 304 of the Indian Penal Code, to ten years' rigorous imprisonment.

It has been fully proved that there are various factions among the residents of the village of which the deceased was and the appellants are residents and that considerable enmity existed between the deceased and the appellants. A few days before the occurrence, the deceased had given evidence against the appellants, and on the day on which he was killed he was to have given evidence against them in the Tahsildar's court in favour of one of his partizans. That morning, while he was seated at his *chaupal*, the three accused came there, armed with *lathis*, and challenged the deceased Girdhar Singh. There was an exchange of abuse and each side threatened to strike the other. Some of the persons who were there intervened and one of them asked Girdhar Singh to go into his house and pushed him towards the door. When he had moved a few paces, the three accused attacked him with their *lathis*, knocked him down and inflicted injuries. The medical evidence shows that his skull was extensively fractured and this resulted in his death, which took place the same evening. The above facts are fully proved by the witnesses for the prosecution who have been believed by the learned Sessions Judge and whom there is no reason to disbelieve. Their evidence, however, does not show which of the three accused struck the fatal blow which caused the fracture of the skull. With the exception of Hub Lal, who only says that Tota accused struck the deceased on the head, the others are unable to say anything on the point. Hub Lal is the brother of the deceased and it is probable that he was exaggerating. The evidence leaves it in doubt which of the assailants of Girdhar Singh struck the blow which proved fatal. Under these circumstances the appellant

cannot be convicted under section 304. The common intention of the accused was not to cause death or such injury as was likely to cause death but only to cause grievous hurt. This case is similar to that of *Emperor v. Bhola Singh* (1), in which it was held, under circumstances which were exactly the same as those of the present case, that the accused were guilty under section 325 and not under section 304. I therefore alter the conviction to one under section 325 of the Indian Penal Code and reduce the sentence, in the case of each appellant, to one of five year's rigorous imprisonment.

Conviction altered.

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REVISIONAL CRIMINAL.

Before Mr. Justice Piggott and Mr Justice Walsh.

EMPEROR v MANIK CHAND.*

1917
November, 11

Act (Local) No. I of 1904 (General Clauses Act), section 24—Effect of General Clauses Act as regards rules framed under the former Municipalities Act of 1900—Municipal Account Code, rule 40—Oction duty

A consignment of cloth addressed to one *M* reached one of the oction barriers of Bareilly on the 19th of February, 1917. The officer in charge demanded a larger sum than *M* considered properly leviable. The matter was referred to the Oction Superintendent who, as he had the right to do, assessed the duty at Re 1 0 9. Under rule 40 of the Municipal Account Code framed under Act No I of 1900, a person in the position of *M* could appeal against the decision within sixty days, but he could only exercise the right by first paying under protest the duty demanded. *M*, however, appealed against the decision without making the payment. On the expiry of sixty days a prosecution was instituted against *M* under Act No. II of 1916, and he was fined. He applied in revision to the High Court :—*Held* that the conviction was legal; the jurisdiction of the court was saved by section 24 of the Local General Clauses Act, and the fact that the prosecution had been instituted under the Municipal Account Code framed under the repealed Municipalities Act (No I of 1900) did not affect the question. *Held* also that the mandatory direction in rule 40 of the Municipal Account Code lays down, by inference, a period of 58 days, on the expiry of which without payment as required the offence is complete and a prosecution may be started.

* Criminal Revision No 669 of 1917, from an order of Muhammad Mutiullah Khan, Magistrate, First Class, of Bareilly, dated the 31st of May, 1917.

(1) (1907) I L. R., 29 ALL. 282.

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THE facts of this case were as follows :—

On the 19th of February, 1917, a consignment of cloth addressed to one Manik Chand, reached one of the octroi barriers of the Bareilly Municipality. The officer in charge demanded a larger sum by way of duty than Manik Chand considered was properly leviable, and the question was referred to the Octroi Superintendent. He assessed the duty at Re. 1-0-9. It was open then to Manik Chand to appeal against the Superintendent's assessment but he could only exercise that right by paying, under protest, the sum demanded as octroi duty, and then appealing within 7 days of such payment. Manik Chand did not pay the duty demanded, but he presented a petition to the Chairman of the Board, which, however, could not be regarded as a valid appeal from the assessment. After the expiry of 60 days a prosecution was instituted for a breach of rule 40 of the Municipal Account Code. Manik Chand was convicted and fined Rs. 5. He thereupon applied in revision to the High Court.

Babu *Priya Nath Banerji*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

PRIGGOTT, J.—This is an application in revision against the conviction of one Manik Chand, a shop-keeper and cloth-dealer of the city of Bareilly, on a prosecution instituted against him under the orders of the Municipal Board of that place. It would appear that on the 19th of February a consignment of cloth addressed to Manik Chand reached one of the octroi barriers on the boundary of the aforesaid Municipal area. The officer in charge demanded a larger sum by way of octroi duty than Manik Chand considered was properly leviable under the rules. The matter was referred to the Octroi Superintendent, who assessed the duty at Re. 1-0-9, and it is quite clear that he had power to do this under the rules. The position then became this, that Manik Chand had a right of appeal within sixty days against the decision of the Octroi Superintendent, but that he could only exercise that right by first paying under protest the duty demanded and then appealing within seven days of the date of this payment. Practically the result is that he had 53 days within which to make up his mind whether he would pay or not, and if he desired to

pay under protest and to exercise his right of appeal, he could then do so. Manik Chand seems to have elected to fight the matter out with the Board. It seems that he presented a petition to the Chairman, but as he did this without having paid, under protest or otherwise, the extra duty demanded, it could not be treated as a valid petition of appeal. On the expiry of the sixty days a prosecution was instituted by the issue of a summons from a Magistrate's court, and Manik Chand has been sentenced to a fine of Rs. 5 for breach of rule No 40 of the Municipal Account Code, which lays down that under the circumstances above stated a person in the position of Manik Chand should pay the duty as assessed by the Octroi Superintendent subject to the right of appeal already mentioned.

The substantial point taken in the petition before us is that Manik Chand, having left the goods in question in the possession of the Municipal authorities, should not be regarded as having committed any offence. This plea would be a valid answer if the case against Manik Chand were that he had introduced, or attempted to introduce, within octroi limits goods liable to the payment of octroi for which the octroi due had neither been paid nor tendered (*vide* section 155 of the United Provinces Municipalities Act, No. II of 1916). This, however, is not the question before us. What we have to determine is whether there has been a punishable breach of a rule validly made by the Local Government under powers lawfully exercisable by that Government. We feel some difficulty over the question as to whether the mandatory direction in rule 40 already referred to, which directs that the person thinking himself aggrieved by the assessment made by the Octroi Superintendent shall pay the sum so assessed subject to a right of appeal, could be made the basis of a prosecution, in the absence of a clear specification of the period within which such payment must be made, the expiration of which without payment could be regarded as completing the offence. We think, however, upon an examination of the rules, that the necessary period is laid down by inference and that it is a period of 53 days from the date of the Octroi Superintendent's assessment. It has been suggested before us in argument, although the point is not explicitly taken in the petition for revision, that the rules of the Municipal Account Code

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under which this conviction has been affirmed are no longer in force, by reason of the repeal of the former Municipalities Act, No. I of 1900, under which these rules were framed. We have been informed that the question of the revision of the Municipal Account Code is under consideration, and it may well be that this rule, amongst others, would be the better for revision in the direction of greater clearness and definiteness. In the meantime, however, no fresh rules have been issued under the powers exercisable by the Local Government by virtue of section 299 of the present Act. On this point it would seem that the jurisdiction of the court is saved by section 24 of the Provincial General Clauses Act, No. I of 1904. In a very similar case another Judge of this Court has treated the provisions of this Act as validating a prosecution for an offence punishable, if at all, only under the Act of 1900, *vide* the case of *Emperor v. Amir Hasan Khan* (1). There is therefore authority for the view which we take of the operation of section 24 above referred to. We are of opinion that this application fails and must be dismissed.

WALSH, J.—I agree. I have felt some doubt as to whether the old rules of 1900 have not ceased to have any operative effect, so far as they are inconsistent with section 155 of the new Act, and of course care will have to be taken when making the new rules, in dealing with this matter, which is expressly provided for by section 155 of the new Act; but I do not feel so clear about it that I ought to differ. After all it was the duty of the octroi official to collect the money, and if the payment made under protest, either with the object of presenting an appeal or where no appeal is preferred, turns out in fact to be in excess of the proper amount payable, there is an authority of this Court, that it can be recovered in a suit against the Municipality for money had and received. I agree therefore that this is not a case for interference in revision.

By THE COURT.—The application is dismissed.

Application dismissed.

(1) (1917) 15 A. L. J., 159.

APPELLATE CIVIL.

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November, 12*Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada
Chaman Banerji*

DAMBAR SINGH (OBJECTOR) *v* KALYAN SINGH (DECREE-HOLDER).^{*}
*Civil Procedure Code (1908), order XXXIV, rules 4, 5 and 10—Suit for sale
on a mortgage—Form of decree—Construction of decree—Costs—Appeal*

A suit for sale on a mortgage was decreed by the court of first instance, dismissed by the court of first appeal, and again decreed by the High Court. In the judgement of the High Court it was stated:—

“We must allow the appeal, set aside the decree of the lower appellate court, and restore the decree of the court of first instance with costs in all courts.” The decree of the High Court was drawn up on one of the High Court forms. It stated that the appeal had been allowed, the decree of the lower appellate court set aside, and the decree of the court of first instance restored. It went on to state:—“And it is further ordered that the respondent do pay to the appellant Rs. 554-6-9, the amount of costs incurred by the latter in this Court and in the lower appellate court.”

Held that in construing this decree it was open to the Court to consider, first, the nature of the suit, secondly, the judgement of the High Court upon which the decree was founded, and the general practice of the Court and that, considering these matters, the intention was that there should be the ordinary mortgage decree awarding the costs incurred in the suit and up to the time of the final decree to be realized by sale of the mortgaged property. *Magbul Fatima v Lalla Prasad* (1) and *Ambe Sakai v. Shambhu Nath* (2) followed.

THE facts of this case, [so far as they are necessary for the purposes of the report, are as follows:—

Certain property was usufructuarily-mortgaged to Ausaf Ali and two others in 1867. Ausaf Ali had a one-third share in the mortgage. Ausaf Ali made a sub-mortgage of his mortgagee rights to Gokul Chand whose representative by purchase was Kalyan Singh, the respondent. In execution of a simple money decree against Ausaf Ali, his mortgagee rights were sold and purchased by Dambar Singh, the appellant. The mortgage in favour of Gokul Chand was made before the purchase by Dambar Singh. Kalyan Singh brought a suit for sale on his mortgage against Dambar Singh, Ausaf Ali's heirs and the original mortgagors.

^{*} Second Appeal No. 71 of 1917, from a decree of W. F. Kirtan, Second Additional Judge of Aligarh, dated the 30th of June, 1916, confirming a decree of Shamsuddin Khan, First Additional Subordinate Judge of Aligarh, dated the 6th of May, 1916.

(1) (1898) I.L.R., 20 All., 528.

(2) (1902) I.L.R., 40 All., 114 (foot-note).

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The latter were *pro forma* parties. The suit was decreed by the court of first instance; and a decree in terms of order XXXIV, rule 4, was drawn up. Dambar Singh alone appealed against Kalyan Singh only, and the appeal was decreed, the suit being dismissed. Kalyan Singh appealed to the High Court and his appeal was allowed. The decretal order in the judgement was in these words:—"We allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance with costs in all courts. We extend the time for payment by six months from this date."

The decree in the High Court was in the ordinary form in which all decrees in appeals are drawn up. As regards the costs, that decree ran as follows:—"That respondent do pay to the appellant the sum of Rs. 393-2-9 the costs incurred by him in this Court and Rs. 161-4-0 the costs incurred by him in the lower appellate court." Upon this decree being passed, Kalyan Singh applied to execute the decree for costs against Dambar Singh personally. The judgement-debtor, Dambar Singh, objected that the decree was not executable against him personally and that the costs must be realized out of the mortgaged property. The courts below repelled this objection and allowed the application for execution. Dambar Singh appealed to the High Court.

The case was referred to two Judges by KNOX J.

Babu *Piari Lal Bunerji*, for the appellant :—

The courts below have erred in allowing execution against Dambar Singh personally. The High Court on appeal modified the decree by extending the time for payment, which would necessitate the taking of accounts afresh by adding interest to the original mortgage-money. The costs awarded by the High Court are also part of the mortgage-money and are to be realized out of the property. As there can be only one final decree in a suit for sale on a mortgage, these "subsequent costs" must be included in the mortgage-money under order XXXIV, rule 10; *Gajadhar Singh v. Kishan Jiwan Lal* (1). The judgement of the High Court purports to pass a decree for sale in a mortgage suit, and though the decree may run in these words "the respondent

(1) (1917) I. L. R., 39 All., 641.

do pay etc.," the decree does not lose its character of a mortgage-decree. The decree must be read with the judgement. In the case of *Maqbul Fatima v. Lalta Prasad* (1) the decree was exactly in the form in which it is in the present case, but the Full Bench interpreted it as a mortgage-decree in which costs form part of the mortgage-money, and it was laid down that the judgement might be referred to for the purpose. It was necessary for the respondent, Kalyan Singh, to appeal in order to secure the decree on the mortgage. It was undoubtedly possible to pass a personal decree against Dambar Singh, but that was not done in the present case. The question was also considered by STANLEY, C. J. and AIKMAN, J. in *Ambe Sahai v. Shambhu Nath*, (2) decided on the 28th of June, 1902 [unreported], and the appellate costs were to be held part of the mortgage-money and to be payable out of the mortgaged property.

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He commented on and distinguished *Bansgopal Singh v. Rup Narain Singh* (3) and *Muhammad Sadiq v. Ghous Muhammad*, (4) and submitted that some of the observations of PIGGOTT, J., would not hold good in view of the Full Bench case *Gajadhar Singh v. Kishan Jiwan Lal* (5).

Babu Sarat Chandra Chaudhri, for the respondent :—

The present matter arises in execution proceedings, and as such the court executing the decree cannot go behind the decree. Consequently it is bound to execute the decree of the High Court as it is. As that decree is worded, it is one under which costs are payable by the judgement-debtor personally. The question is not what the decree ought to have been but what the decree actually is, and the decree as passed clearly directs costs to be paid personally. It is not necessary in every case for a decree-holder to have recourse to order XXXIV, rule 6, of the Code of Civil Procedure to realize a decree for costs; *Mohonya Ojha v. Bahadur Singh* (6). The appellant in the present case should have seen that the decree of this Court was properly drawn up. The decree is in the form prescribed by order XLI, rule 35, of the Code of Civil Procedure. That rule requires that a decree in appeal should

(1) (1898) I. L. R., 20 All., 523.

(4) (1913) 11 A. L. J., 975.

(2) E. S. A., No. 87 of 1900.

(5) (1917) I. L. R., 39 All., 641.

(3) (1913) Indian Cases, 334.

(6) (1911) 16 C. W. N., 731.

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state "by whom or out of what property" the costs are to be paid; and in the present case the judgement-debtor is directed to pay the costs. Further, no decree in conformity with order XXXIV, rule 4, was drawn up in the High Court, and what the decretal order in the judgement amounted to was that by it the decree of the lower appellate court was declared to be wrong and that of the court of first instance was held to be right, and in restoring the *status quo ante* costs were awarded to the then successful appellant. There was no question as to how the costs were to be paid till the decree of the High Court made that clear. The case of *Maqbul Fatima* (1) is distinguishable on two points: (1) a decree was drawn up strictly in terms of what was then section 88 of the Transfer of Property Act in the court of first instance. The direction as to costs separately was not in accordance with law, (2) there was no controversy as to the costs of appeal, as was expressly stated in the judgement. TUDBALL, J., in 19 Indian Cases, relies on this circumstance for distinguishing that case. The interpretation of order XXXIV, rule 10, Civil Procedure Code, (corresponding to section 94 of the Transfer of Property Act) as laid down in the unreported case which is certainly against the respondent, is too wide. The costs referred to in that rule are those costs which have to be incurred in working out the final decree. Even if no appeal may be preferred, these costs are allowed to the mortgagee as his costs of suit; *Mohamad Sadiq v. Jaigopal* (2). It is therefore, submitted that the lower courts are right.

Babu *Piari Lal Banerji*, was not heard in reply.

RICHARDS, C. J., and BANERJI, J.:—This appeal arises under the following circumstances. A suit was brought to realize the amount of a mortgage. The property mortgaged was mortgagee rights. The facts are somewhat complicated, but it is not necessary to mention them in detail. The court of first instance decreed the plaintiff's suit. On first appeal the decision of the court of first instance was overruled and the suit dismissed. On second appeal to the High Court the decree of the first court was restored. In its judgement the High Court says:—"We must allow the appeal, set aside the decree of the lower appellate court

(1) (1913) 1, L. R., 20 All, 528. (2) (1914) 24 Indian Cases, 873.

and restore the decree of the court of first instance with costs in all courts. We extend the time for payment to six months." The decree of the High Court was drawn up upon one of the High Court's forms. It states that the appeal has been allowed, the decree of the lower appellate court set aside and the decree of the court of first instance restored. It further contains the words "and it is further ordered that the respondent do pay to the appellant Rs. 5 4-6-9, the amount of costs incurred by the latter in this Court and in the lower appellate court." The decree of the court of first instance which was restored by the High Court was the ordinary mortgage decree in the form prescribed by order XXXIV. The plaintiff applied to execute the decree of the High Court for costs personally against Dambar Singh, (the appellant in the lower appellate court and the unsuccessful respondent in the High Court). Dambar Singh objected that the costs were not payable by him personally and that the decree-holder could only obtain them by bringing the property to sale. Both courts overruled his objection. Dambar Singh comes here in second appeal.

There can be no doubt that, ordinarily speaking, the plaintiff in a mortgage suits gets his costs if successful against the mortgaged property and not personally against the defendant. It could not be contended that under the decree of the court of first instance (subsequently restored by the High Court) the plaintiff could get his costs personally against Dambar Singh. If the decree of the High Court had expressly followed the judgement, we do not think it could be contended that Dambar Singh was personally liable for the costs. Accordingly the respondent is driven to rely upon the words which we have quoted from the decree of the High Court. There cannot be the least doubt that there is no intimation in the judgement that the High Court intended to make Dambar Singh personally liable. It seemed almost certain that under ordinary circumstances in a case similar to this the plaintiff in a mortgage suit would add the costs incurred by him in the High Court to his costs incurred in the court below and sell the property to realize those costs. We think that we are entitled in construing the decree in the present case to consider first the nature of the suit,

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secondly, the judgement of the High Court upon which the decree is founded and the general practice of the Court. Considering these three matters, it seems to us quite clear that the intention was that there should be the ordinary mortgage decree awarding the costs incurred in the suit and up to the time of the final decree to be realized by sale of the mortgaged property. It is contended that we are bound by the actual words of the *decree* itself and we are not entitled to consider any other matter. The very same question seems to have arisen in the case of *Maqbul Fatima v. Lalta Prasad* (1). In that case a decree which had been drawn up in accordance with the requirements of section 88 of the Transfer of Property Act contained a further clause that the defendant should pay to the plaintiffs a sum of Rs. 876, the amount of costs incurred by them. The majority of the Court held that the costs could not be recovered personally against the defendant and that the Court in construing the decree was entitled to consider the terms of the judgement. The same point seems to have arisen in an unreported case Execution Second Appeal No. 871 of 1900*, when two Judges arrived at a similar conclusion. We have been referred to the case of *Muhammad Sadiq v. Ghous Muhammad* (2) and also to the case of *Bansgopal Singh v. Rup Narain Singh* (3). In the first case an authority was

*E S A. No 871 of 1900, decided on the 28th June, 1902.

STANLEY, C. J., and AHLMAN, J.—This is an appeal by a judgement-debtor against the orders of the two lower courts. The decree holder obtained a decree for sale on foot of a mortgage. An appeal was taken to the District Judge and the District Judge affirmed the decree of the lower court and dismissed the appeal with costs. In the decree, in addition to the dismissal of the appeal with costs, there are the two following directions, namely that the appellant do pay to the respondent the sum of Rs. 225, the amount of costs incurred by him in this court and that the defendants do pay to the plaintiff the sum of Rs. 538-20, the costs incurred by him in the lower court. The costs incurred in the court of first instance were by the order of that court properly added to the plaintiff's demand and the property directed to be sold in default of payment of principal, interest and costs. It was therefore entirely unnecessary for the District Judge to have ordered payment by the defendants of this sum which had already been provided for by the decree of the court of first instance. The decree-holder applied for execution in respect of the sum of Rs. 225, the amount of costs so awarded to him, *against the property of the judgement*

(1) (1898) I L R., 20 All., 528. (2) (1913) 11 A L. J., 975.

(3) (1913) 19 Indian Cases 384

relied upon by the learned Judge which has since been dissented from. The other case seems to turn upon the particular facts of the case and the view which the learned Judge, sitting alone, took as to the construction of the decree. If these cases are inconsistent with the Full Bench decision and the decision of the Divisional Bench we are bound to follow the latter. While we decide in favour of the appellants, we think it right to say that the form used by the High Court is not strictly correct as applied to mortgage suits. Order XL, rule 35, prescribes what a decree of the appellate court shall contain, and it would seem that it is more accurate that in mortgage suits where it is the intention of the court that the costs should be recoverable out of the property and not personally against the party, the decree of the High Court should so state. It perhaps may also be considered whether in mortgage suits in which the High Court is making a decree for sale the High Court's decree instead of merely being a dismissal or affirmation of the decree of the lower court, should not be in the form prescribed by order XXXIV directing the

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debtor other than that which was comp used in the mortgage. This judgement-debtor objected, contending that the costs awarded against him in the appellate court should be added to the decree-holder's demand and realized out of the mortgaged property in the first instance. Now section 94 of the Transfer of Property Act provides that in a case of sale under a mortgage, in adjusting the amount to be paid to the mortgagee, "the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage money such costs of suit as have been properly incurred by him since the decree for foreclosure, redemption or sale up to the time of actual payment." Under this section it was the duty of the Judge to add to the mortgage money the costs of the appeal. We are asked to say that the District Judge in this case has not done so. Both the lower courts seem to have ignored the provisions of Section 94 and allowed the execution by attachment of the property of the judgement-debtor other than the property comprised in the mortgage. We think that the true construction of the decree is that, just as in the case of the costs in the court of first instance, so in the case of the costs awarded in the lower appellate court both sets of costs should be added to the mortgage money and be payable out of the mortgaged property in the first instance and not that a personal decree for these costs was intended. In regard to a small sum of Rs. 64, the judgement-debtor also appealed. In regard to this sum the appeal has not been pressed. So far as regards the sum of Rs. 225, we allow the appeal. But as regards the sum of Rs. 64, the appeal is disallowed. The parties are to pay and receive the costs of these proceedings both here and in the courts below proportionate to their failure and success.

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property to be sold and stating the amount which is to be recovered from the property including costs. In a recent Full Bench case it was decided that the High Court's decree in a mortgage suit is the decree which is to be subsequently made absolute, and not the decree of the court below. We wish also to say that we do not desire to be understood as holding that it is not open to the court in mortgage suits to provide in its decree, under special circumstances, that costs are to be paid personally by a party instead of being recovered as part of the mortgage-debt. We allow the appeal, set aside the orders of both the courts below and dismiss the application for execution with costs in all courts.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Justice Sir George Knox.

EMPEROR v KHUSHALI RAM *

1917
November, 19.

Criminal Procedure Code, sections 476 and 478—Commitment made by a Munsif in the United Provinces to the court of a Sessions Judge in the United Provinces in respect of offences alleged to have been committed in Bengal—Jurisdiction.

Where in the course of a judicial proceeding before the Munsif of Fatehabad in the district of Agra certain offences under sections 193, 209, 210, 467 and 471 of the Indian Penal Code, which appeared to have been committed in Bengal were brought under the notice of the court, and the Munsif committed the person suspected of such offences for trial to the court of Session at Agra, *Held* that the court had jurisdiction under section 478 read with section 476 of the Code of Criminal Procedure to make the commitment.

THIS was a reference, made under section 185 of the Code of Criminal Procedure by the Sessions Judge of Agra, in the matter of a commitment made to his court by the Munsif of Fatehabad in that district. The following is the order of reference:—

“Khushali Ram has been committed to this court by the Munsif of Fatehabad in the Agra district on charges under sections, 467, 471, 193, 209 and 210 of the Indian Penal Code. The offence under section 467 is alleged to have been committed at Sirajganj in Bengal and the other offences are alleged to have been committed in the court of the Munsif of Sirajganj. It is pleaded by the accused that this court has no jurisdiction to try

* Criminal Reference No. 872 of 1917.

the case. I have considered the point carefully and it seems to me that upon a literal interpretation of sections 476 and 478 of the Criminal Procedure code, when the commission of any offence specified in section 195 is brought to the notice of a court in the course of judicial proceeding, any first class magistrate of the same district, or, if the case is triable exclusively by the court of session, the court of session within the limits of whose jurisdiction the court making the preliminary inquiry is situate, is competent to try the case. As, however, it is possible to entertain some doubt as to whether this can be held to have been the real meaning of the Legislature in regard to an offence committed in a totally different court in a different province, and as the accused's pleader informs me that, if I rule against him, his client intends to go up in revision against such order, I think it is advisable, in order to settle the point once and for all and avoid waste of time, to refer the matter to the Hon'ble High Court. I therefore make this reference under section 185 of the Criminal Procedure Code to the Hon'ble High Court for instructions as to which court is competent to try this case.

"I may note that the Hon'ble High Court's order passed in Civil Revision No. 12 of 1917 is not on the record and does not appear to have been received here, and I am therefore not in a position to know whether the question of the jurisdiction of this court was discussed or determined in that order or not."

The Government Advocate (Mr. *A.E. Ryves*), for the Crown.

Mr. *J. M. Banerji*, the opposite party.

KNOX, J.—I have read the order of the Sessions Judge of Agra, dated the 15th of October, 1917. That order sets out that the Munsif of Fatehabad in the Agra district was of opinion that there was ground for inquiring into offences supposed to have been committed under sections 467, 471, 193, 209 and 210 of the Indian Penal Code. The offence under section 467 was alleged to have been committed at Sirajganj in Bengal and the same remark applies to the other offences. The accused was committed for trial to the Court of Session at Agra, the court to which the Munsif of Fatehabad could commit the accused person. The accused pleaded that the court of the Sessions Judge of Agra had no jurisdiction to try the case. The latter court acting under

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the provisions of section 185 of the Criminal Procedure Code has asked this Court to decide whether the offence shall be tried by that court or by some court having jurisdiction in the province of Bengal. The learned counsel who appears for Khushali Ram in this Court contends that the offence was committed within the province of Bengal and, as it is an offence referred to in section 195 of the Code of Criminal Procedure, it cannot be inquired into except with the previous sanction or on the complaint of the court before which the offence was committed in Bengal or of some other court to which such court is subordinate. I am unable to accede to this contention. Section 476 of the Code of Criminal Procedure contemplates not merely offences committed before the Munsif of Fatehabad but also offences brought under the notice of the Munsif in the course of a judicial proceeding. This was a judicial proceeding before the court of the Munsif of Fatehabad and the offences were brought to the notice of the Munsif in the course of that proceeding. Ordinarily, the Munsif would have under section 476 to send the case under such circumstances for inquiry or trial to the nearest Magistrate of the first class. He certainly would have no jurisdiction to send the case for inquiry or trial to any court within the province of Bengal, and, under section 478, he had jurisdiction to commit the accused to take his trial before the Court of Session, obviously the court of the Sessions Judge of Agra.

The words "referred to in section 195" which have found a place in section 476 of the Code of Criminal Procedure are merely words descriptive of the class of offences with which the Munsif can deal. They do not mean that section 195 governs section 476 to any extent other than that just mentioned.

Let the record be returned to the Sessions Judge of Agra who will proceed to deal with the case according to law.

Record returned.

APPELLATE CRIMINAL.

Before Justice Sir George Knox

EMPEROR v. HARRIS *

1917
November, 22.

Act No. XLV of 1860 (*Indian Penal Code*), sections 403 and 22—*Criminal misappropriation*—"Movable property"—"Letter addressed to one person retained by another"

A letter addressed to W was handed by a postman to W, who was at the time in a room in the occupation of H. W read the letter, and put it on a table in the room and left it there. H took the letter, and subsequently attempted to file it as an exhibit attached to an affidavit made by him in a suit for judicial separation between W and his wife, for the purpose, as he afterwards stated, "of strengthening Mrs. W's case and of improving his own position." The Court, however, refused to receive the letter. *Held* that in the circumstances H could not be convicted of dishonest misappropriation of property with respect to his retention of the letter. *Quæritur* whether the letter could be regarded as "movable property" within the meaning of section 22 of the Indian Penal Code.

THE facts of this case were briefly as follows:—

The appellant Harris was a guest in the house of one Williamson. One day when Williamson was talking to Harris in the room occupied by the latter a letter was handed to him by a postman. This letter Williamson read, and then apparently left it on the table in Harris' room. What happened after is not quite clear, but subsequently Harris had occasion to file an affidavit in a suit for judicial separation between Williamson and his wife. To this affidavit Harris attempted to append the letter in question as an exhibit, but the court refused to accept it. According to Harris' account, his object in tending the letter was "to strengthen Mrs. Williamson's case and to improve his own position." In respect of his retention of this letter a case was instituted against Harris under section 403 of the Indian Penal Code, and he was convicted and sentenced. He thereupon appealed to the High Court.

Babu *Satya Chandra Mukerji*, for the appellant.

Mr. *J. M. Banerji*, (for Government Pleader) for the Crown.

KNOX, J.—Harris has been convicted under section 403 of the Indian Penal Code of criminal misappropriation of property. The judgement under which he has been convicted says that the

* Criminal Appeal No. 834 of 1917, from an order of T. Sloan, City Magistrate of Lucknow, dated the 25th of September, 1917.

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property misappropriated is a letter which is on the record and which is marked Exhibit B. This is the only property regarding which any decision is to be arrived at in this appeal. Exhibit B is a letter which undoubtedly does no credit to the person who wrote it and would have been far better unwritten. But with that I am not concerned in the present appeal. I have only to decide the questions (1) whether the said letter is *property* within the meaning of the Indian Penal Code, (2) if it is property, whether it has been criminally misappropriated by Harris. The letter is admitted to be a letter addressed to Williamson, the complainant in the present case. It is also admitted that this letter first came into evidence, so far as this case is concerned, in a room occupied by Harris within the house in which for the time being Williamson was residing and Harris residing with Williamson as a guest. Harris was for the time being occupying the particular room. A postman is said to have brought the letter Exhibit B into this room. Williamson says that on receipt of the letter he placed it in a drawer of his writing table. The learned Magistrate has, however, thrown such doubt upon the evidence given by Williamson in the case that it is impossible to act upon it in a criminal case. The prosecution were therefore compelled to fall back upon the statement made by Harris himself regarding this matter and to contend that according to that statement the letter was Williamson's property, was handed over to Williamson, who threw it on a table at which he and Harris were standing or seated, and it next appeared in a court at Bareilly in the pocket of Harris. Harris attempted to have the letter filed in a case then pending between Mrs. Williamson and Williamson for judicial separation. The letter was handed by Harris to the Judge, who, however, refused to receive it and returned it to Harris. This, it is argued, amounted to a retention of property, the property of Williamson, and that retention was done with the intention of causing wrongful gain or wrongful loss.

I have considerable doubts myself as to whether the letter under the circumstances stated by Harris in his statement was property within the meaning of the Indian Penal Code. It would be difficult to hold that an envelope thrown by the owner

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of the envelope into a waste paper basket and picked up or carried away by another person would be property within the meaning of that Code. To throw more light on this it is well to look to the actual terms used by Harris in this connection. If Harris is to be convicted on his own statement, that statement must be taken as a whole and with its natural meaning. Harris says that Williamson read the letter and placed it on Harris' table, that Williamson was drunk at the time and after an interval left the letter on the table and that Harris felt justified in his own interest as also in the interests of Mrs. Williamson to attach it to his (Harris') affidavit so as to strengthen her case, and *improve his own position*, whatever these last words may amount to. I have already said that I have considerable doubt as to whether a letter of this kind and under these circumstances comes within the meaning of "movable property" as used in the Indian Penal Code. Assuming for the moment that it does, the next point which is to be considered is whether the evidence has established that Harris dishonestly misappropriated or converted to his own use this letter. Proof of dishonest misappropriation or conversion to the use of the accused is as essential an ingredient as any other ingredient for an offence under section 403 of the Indian Penal Code. I have heard Harris, who conducted his own case, and also the learned Government Pleader. I have also considered the evidence on the record. I have not to consider whether Harris converted the letter to the use of Mrs. Williamson. It must be a conversion to his own use, and the only evidence which bears on this rests upon the words used by Harris "I attached the letter to my affidavit so as to improve my own position." Had this been explained by Harris elsewhere in his statement, or had there been any evidence on the record explaining these words, the matter might have been different. I hold that these words standing by themselves are not sufficient to establish a conversion of the letter to the use of Harris.

It may be necessary to add something as regards dishonest misappropriation. With reference to this it is necessary to consider whether it has been established that wrongful gain or wrongful loss was intended to be caused. With regard to wrongful gain it appears to me from the definition given in

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section 23 of the Indian Penal Code that "gain by unlawful means" is given to Harris and that we have not to consider gain to Mis. Williamson or to anyone else. I am unable to hold that when Harris picked up the letter, he had any intention to cause wrongful gain within the meaning of section 23 of the Indian Penal Code, and I think it would be stretching the definition of wrongful loss if I were to hold that Harris, by picking up this letter and attaching it to his affidavit, which, according to him he was then preparing, and by keeping it afterwards until he produced it in a court at Bareilly, was causing wrongful loss within the meaning of section 23. I hold it to be no part of my judgement that I should go, as the court below did, into the moral aspect of this case. I have only to consider whether the offence of which Harris has been found guilty is established against him by the evidence. Holding that it is not, I set aside the conviction and sentence passed by the City Magistrate of Lucknow, and direct that the fine or any part thereof, if realized, be returned to Harris.

Conviction set aside.

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Bafo e Sri Henry Richards, Knight, Chief Justice, and Justice Sri Pramada Chawan Danu pr.

SHEO PRASAD SINGH (JUDGEMENT DISTORT) v PRAMANA KUNWAR
 (DECREE-HOLDERS) *

Civil Procedure Code (1908), section 104, order XXI, rules 90 and 92, order XLIII, rule 1 (j)—Execution of decree—Sale in execution—Application to set aside sale rejected—Appeal.

Under order XXI, rule 90, of the Code of Civil Procedure, 1908, an application may be made to set aside a sale held in execution of a decree, upon the ground, amongst others, of fraud in the publication or conduct of the sale, and if this application is refused under rule 92, an appeal lies under order XLIII, rule 1, clause (j), but no second appeal is allowed from the order of the appellate court.

THE facts, so far as they are material for the purpose of this report, were as follows :—The respondent held a decree for sale against the appellant and his son, and in execution thereof

* First Appeal No 77 of 1917, from an order of G. O. Badhwar, District Judge of Ghazipur, dated the 30th of March, 1917.

brought half of the mortgaged property to sale and purchased it herself. The present appellant, alleging fraud in the publication and conduct of the sale, applied under order XXI, rule 90, of the Code of Civil Procedure to have the sale set aside. The first court granted the application. On appeal by the decree-holder, the District Judge reversed the Munsif's order and dismissed the application. Against this order of the District Judge, the judgment-debtor filed the present appeal in the High Court and headed it as a "First Appeal from Order."

Babu *Kamala Kant Varma*, for the respondent, took a preliminary objection to the hearing of the appeal —

No appeal lies from an order passed in appeal, setting aside or refusing to set aside a sale, on an application under order XXI, rule 90, of the present Code of Civil Procedure — an appeal against orders passed on such applications is allowed, as an appeal from an order, by clause (j) of order XLIII, rule 1, which is governed by section 104, subsection (1), clause (2). Subsection (2) of section 104, prohibits any second appeal. There having already been one appeal in this case, the present appeal does not lie.

The words "or fraud" did not occur in the corresponding section 311 of the old Code. So, under that Code, it was held that applications to set aside a sale, when they were based on the ground of "fraud," came under section 244 (now section 47), and as according to section 2 of the Code the determination of any question within section 244 amounted to a decree, as it does even now, a second appeal lay. The object and effect of adding the words "or fraud" to rule 90 of order XXI of the present Code are to take applications for setting aside a sale based on "fraud" out of the purview of the present section 47, and to bring such applications also within rule 90 of order XXI. That being so, no second appeal lies.

Pandit *Uma Shankar Bagpar*, for the appellant, submitted that in this particular instance the new Code of Civil Procedure had not effected any change in the law and referred to cases decided when the former Code of Civil Procedure was in force in which it was held that a second appeal lay in cases of the nature of the present case.

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Babu *Kamala Kanta Varma*, was not called upon to reply.

RICHARDS, C.J., BANERJI, J.:—A preliminary objection has been taken to the hearing of this appeal on the ground that an appeal does not lie. The facts are these. The property of the appellant, who was judgement-debtor to a decree, was sold by auction. He made an application under order XXI, rule 90, to have the sale set aside on the ground of irregularity and fraud in the publication and conduct of the sale. His application was allowed by the court of first instance; but on appeal to the lower appellate court that court allowed the appeal and dismissed the application. From the order of the appellate court the present appeal has been filed. Section 104 of the Code of Civil Procedure, sub-section (2), provides that no appeal shall lie from any order passed in appeal under the section. Clause (i) of sub-section (1) provides that an appeal shall lie from an order made under rules from which an appeal is expressly allowed by the rules. Order XLIII, rule (1), clause (j), expressly provides an appeal from an order under rule 92 of order XXI. That rule refers to an order confirming or setting aside a sale. The order passed in this case was an order refusing to set aside a sale. Therefore an appeal lay to the court below under order XLII, rule 1, clause (j); but, having regard to the provisions of section 104, sub-section (2), no further appeal from the order of the appellate court lies to this Court. The present appeal is consequently not maintainable. The learned vakil for the appellant refers to cases under the old Code of Civil Procedure in which it was held that an order made upon an application to set aside a sale on the ground of fraud, was an order under section 244 of the Code, and therefore a second appeal lay. But the present Code has made an important alteration in this respect, and it provides in order XXI, rule 90, that an application may be made to set aside a sale on the ground, amongst others, of fraud in the publication or conduct of the sale. Under the present Code therefore an application may be made on the ground of fraud, and, if this application is refused, under rule 92, an appeal lies under order XLIII, rule 1, clause (j); but no second appeal is allowed from the order passed by the appellate court. We

accordingly allow the preliminary objection and dismiss the appeal with costs.

Appeal dismissed

*Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir
Pranada Chawan Banerji.*

AMTUL HABIB (DECREE-HOLDER) v MUHAMMAD YUSUF
(JUDGMENT-DEBTOR) *

*Civil Procedure Code (1908), order XXIV, rules 1, 2 and 3—Execution of
decree—Payment of part of decretal amount into court—Effect of payment
as regards running of interest on the decree.*

Where money is paid into court by the judgement-debtor in satisfaction of a decree, interest on the decree will cease from the date of payment in proportion to the amount paid, although such amount may not in fact be the whole amount due under the decree.

THE facts of this case were as follows:—

A decree was obtained for dower for a sum of Rs. 5,000 with interest and costs, to be recovered from the estate of the plaintiff's deceased husband in the hands of the heirs. The decree holder sought to execute her decree and was met with an objection that she herself being one of the heirs and entitled to one-fourth of the estate, the decree could only be executed for three-fourths of the amount. When making this objection the judgement-debtors deposited three-fourths of the amount of the decree, principal, interest and costs. This objection was allowed in the court of first instance. There was an appeal to the District Judge, who held that the decree being for Rs. 5,000, it must be executed for that amount. The High Court upheld this ruling. The execution proceedings then continued; but the decree-holder claimed interest on the full amount of the decree up to the 14th of August, 1915, that is, until three months after the decision of the High Court. The judgement-debtors claimed that interest should not be charged save on the difference between the amount which they had deposited in court and the full amount of the decree, that is to say, that they should be relieved from paying interest on so much as they had deposited from the date of the deposit. This contention

* Second Appeal No. 1483 of 1916, from a decree of J. H. Cuming, District Judge of Saharanpur, dated the 16th of August, 1916, confirming a decree of Kalka Singh, Subordinate Judge of Saharanpur, dated the 18th of December, 1915.

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found favour with both the courts below. The decree-holder appealed to the High Court.

Mr. *M. L. Agarwala* (with whom Mr. *S. M. Yusuf Hasar*) for the appellant.

Mr. *Nihal Chand*, for the respondent.

RICHARDS, C. J., and BANERJI, J.:—This is an appeal arising out of execution proceedings. A decree was obtained for dower for a sum of Rs. 5,000 with interest and costs, to be recovered from the estate of the plaintiff's deceased husband in the hands of the heirs. The decree-holder sought to execute her decree and was met with an objection that she herself being one of the heirs and entitled to one-fourth of the estate, the decree could only be executed for three-fourths of the amount. When making this objection the judgment-debtors deposited three-fourths of the amount of the decree, principal, interest and costs. This objection was allowed in the court of first instance. There was an appeal to the District Judge, who held that the decree being for Rs. 5,000, it must be executed for that amount. The High Court upheld this ruling. The execution proceedings then continued; but the decree-holder claimed interest on the full amount of the decree up to the 14th of August, 1915, that is, until three months after the decision of the High Court. The judgment-debtors claimed that interest should not be charged save on the difference between the amount which they had deposited in court and the full amount of the decree, that is to say, that they should be relieved from paying interest on so much as they had deposited from the date of the deposit. This contention found favour with both the courts below. The decree-holder comes here in second appeal. The matter is not altogether free from difficulty. Order XXIV, rules (1), (2) and (3), provide that in the case of a suit the defendant may pay into court such sum of money as he considers as satisfaction in full of the claim. Notice of the deposit is given to the plaintiff, who is entitled to draw the money out, whether he takes it in full discharge or not, and no interest is allowed to the plaintiff upon the amount of the deposit. There is no corresponding provision as to payment out of court and the cessation of interest in execution matters, but there does not seem to be any reason why the same thing should not happen in execution

proceedings as in the case of suits. In the present case the plaintiff had admittedly a decree which could be executed for at least the sum which had been deposited by the judgement-debtors. We think that there can be very little doubt that if the decree-holder had asked the court executing the decree, and in which the money had been deposited, to pay out this money, at the same time stating that the taking of the money out was without prejudice to the questions raised by the pending appeal, the court would have allowed the decree-holder to withdraw the money, just as the court would have allowed a plaintiff in a suit to withdraw money deposited by the defendant, although the plaintiff does not take it in full discharge. We are borne out in this view by a circumstance which happened in this very case. After the money had been deposited a third party who had a decree against the decree-holder attached a portion of the money which had been deposited in court and the sum was paid out without objection. To hold that the court is not entitled to pay money out to a decree-holder in part discharge of his claim in a case like the present would mean that the money deposited should lie in court of no use to either party, while all the time interest would be running up against the judgement-debtor in the event of the court deciding that there was a greater liability on foot of the decree. Even the decree-holder would not profit, because, if the case was eventually decided against him, he would not have had the benefit of the money which had been deposited by the judgement-debtor. We think that in this case we ought to apply the analogy of the rules which relate to payment into court of money by the defendant in a suit, and that in this view the decisions of the courts below were correct and should be affirmed.

We accordingly dismiss the appeal with costs in all courts.

Appeal dismissed.

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FULL BENCH

Before Sir George Knox, Acting Chief Justice, Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

STAMP REFERENCE BY THE BOARD OF REVENUE *

Act No. II of 1899 (Indian Stamp Act), sections 40 and 57—Instrument certified by Collector to have been duly stamped—Reference by Chief Controlling Revenue Authority to High Court questioning correctness of Collector's decision—Jurisdiction.

Held that if a Collector has taken action under section 40, sub-section (1) (b) of the Indian Stamp Act, 1899, and, having received the deficient duty and the penalty imposed, has certified under sub-section (1) (a) that the instrument before him is duly stamped, the effect of sub-section (2) is that the jurisdiction of the Chief Controlling Revenue Authority to refer to the High Court, under section 57 of the Act, the question whether such instrument is in fact sufficiently stamped or not is ousted. *Reference under Stamp Act, section 57 (1) followed.*

THIS was a reference made under section 57 of the Indian Stamp Act, 1889, by the Chief Controlling Revenue Authority for the United Provinces. The facts of the case appear fully from the following statement made by the Board of Revenue.

“(1) I am directed to refer the following case under section 37 (1) of the Stamp Act, for the decision of the Hon'ble High Court. The case came to the notice of the Board while scrutinizing the monthly statement of cases of the infringement of the stamp law in Agra submitted by the Collector under Rule 204 of the Stamp Manual.

“(2) On the 13th of January, 1914, one Khub Chand and his sons executed a mortgage deed . . . in favour of one Shankar Lal for Rs. 20,500 on a stamp of Rs. 205 mortgaging their proprietary rights in land together with their mortgagee rights in certain other immovable property secured by a mortgage deed, dated the 1st of May, 1909, executed in their favour for Rs. 16,000 by one Ganga Prasad.

“(3) On the 15th of February, 1916, Khub Chand and others sold a portion of the mortgaged property to the mortgagee, Shankar Lal, for Rs. 17,000 out of the mortgage debt of Rs. 20,500, the remaining property being left hypothecated with the mortgagee for the balance of the mortgage money, namely Rs. 5,500 and the

* Stamp Reference in Civil Miscellaneous No. 180 of 1917.

(1) (1901) I. L. R., 25 Mad., 752.

interest on that sum . . . This deed was executed on a stamp paper of Re. 1 only.

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" (4) On the 2nd of April, 1916, another sale deed . . . being virtually in lieu of the former, was executed by the said vendors in favour of the same vendee in respect of the same property which had been sold by means of the sale deed, dated the 15th of February, 1916, for the same amount of consideration, viz. Rs. 17,000 and on the same terms, the only difference being that the sale of a house worth about Rs. 300, which house was mentioned only casually at the end of the body of the previous sale-deed, was in the new sale deed effected by means of express provisions made in the body of the deed itself. This second sale deed was also executed on a stamp of Re. 1 only. It was impounded by the Sub-Registrar of Agra and sent to the Collector of the district under section 30 (2) of the Stamp Act. The Collector held

Duty on Rs. 17,000 plus Rs. 300 on account Rs.
of the house, or Rs. 17,300 under art. 23,
schedule 1 175

Minus
Duty on Rs. 17,000 representing the pro-
portionate amount of the mortgage money in
respect of the whole of which stamp duty has
already been paid under article 23, schedule 1,
read with section 24 of the Act 170

Net duty 5
Duty paid 1
Balance due 4

that the sale-deed was not sufficiently stamped and that the deficient stamp duty payable amounted to Rs. 4 as noted on the margin. He levied this deficient duty and

penalty of Rs. 5 under section 40 (1) (b) of the Act.

" (5) In the first place no additional duty would appear to be due on account of the house worth Rs. 300, as its value is clearly included in the sale price of Rs. 17,000. The main question, however, is whether the Collector was right in holding that because the property sold (except the house) formed a part of the property previously mortgaged by the vendor to the vendee and on which duty had been paid already, the mortgagee was entitled to deduct from the duty payable on the sale-deed the amount of duty paid in respect of the mortgage under section 24 of the Stamp Act. It will be observed that only a portion and not the whole of the property mortgaged under the deed of the 13th of January, 1914, was transferred to the mortgagee, and it would appear therefore that

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the full duty of Rs. 170 in respect of Rs 17,000 was payable on the sale deed (*In re Nirabai*, Indian Law Reports, 29 Bombay, 203) (1). If this view is correct, the Board are doubtful whether the realization of the additional duty can be ordered by them now.

“(6) The case is complicated and the decision of the Hon’ble High Court is solicited on the following two points.

(i) Whether the second instrument of sale is correctly stamped with a duty of Rs. 5 as assessed by the Collector or whether it should be assessed to a duty of Rs 170 following the Bombay ruling.

(ii) Whether the Chief Controlling Revenue Authority has any powers of revision under section 56 (1) of the Act over the action of the Collector under section 40(1) (a) and (b) or over his action under section 40 (1) (b) either *before* or *after* he has given a certificate under 42 (1).

“(7) As regards the latter point attention is invited to Indian Law Reports, 25 Madras, 752 (2). It was held in that case that the Chief Controlling Revenue Authority has no such powers, though the learned Judges of the High Court constituting the Bench which disposed of the reference held divergent views in the matter.”

The Officiating Government Advocate (Mr. W. Wallach) for the Crown :—

The first point is, what is the amount of the stamp duty payable on the sale deed of the 2nd of April, 1916? But for the proviso to the explanation to section 24 of the Stamp Act there could be no room for doubt that the amount of duty payable would be 1 per cent on the sale consideration. That proviso and illustration (3) contemplate cases in which the property sold is identical with that mortgaged. They are inapplicable where only a portion of the mortgaged property is sold; *In re Nirabai* (1). Here, there is the further complication that another item of property which was never mortgaged has also been included in the sale.

The second point that arises is whether the Board of Revenue has any power to refer the matter after the Collector has decided

(1) (1904) I. L. R., 29 Bom., 203. (2) (1901) I. L. R., 25 Mad., 752.

it and taken action under section 40 (1) (b) of the Stamp Act. That section occurs in Chapter IV of the Act ; and under section 56 (1) the powers exercised by a Collector under Chapter IV shall in all cases be subject to the control of the Board. The words used are " in *all* cases." If in any case coming before him under section 40 the Collector feels doubt as to what the correct decision should be, he may refer the case to the Board under section 56 (2). If he does not feel any such doubt, he decides the matter himself and takes what he thinks to be the proper action. To hold that in the latter event the Board cannot, when the case comes to its notice, revise the action of the Collector would be to nullify the ' control ' conferred on the Board by section 56 (1). Under section 57 (1) the Board is entitled to refer to the High Court any case which has either been referred to the Board under section 56 (2) or has " otherwise " *i.e.*, in any way, come to its notice. Further, section 40 (2) interposes no difficulty in this case ; sub-section (2) refers only to certificates endorsed under clause (a) of sub-section (1) of section 40. Here the action was taken under clause (b) of that sub-section and the certificate could only be under section 42 (1). Certificates endorsed under the last mentioned section are not mentioned in section 40 (2). The case of *Reference under Stamp Act, section 57(1)*, was one under section 40 (1) (a), and it was pointed out that in case of a certificate under section 42 (1) the Board has the power to revise ; vide page 766. It is for this Court to express an opinion as to what would be the correct stamp duty ; it would then be for the Board to take any action in the matter that it might think fit. The question whether the Board can now take any steps to overrule the Collector's decision and levy any additional duty does not call for a determination by this Court.

The Hon'ble Munshi *Narayan Prasad Ashthana*, for Khub Chand :—

The present reference by the Board is *ultra vires*. There is no case pending before the Collector or the Board. The word " case " in section 57 is to be interpreted as meaning a pending case and not a case which has been decided by the Collector and in which a certificate has been endorsed by him. I rely on the cases

(1) (1901) L. R. 25 Mad., 752.

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of *Reference under Stamp Act, section 57 (1)* and *Reference under Stamp Act, section 57, (2)*. BHASHYAM AYYANGAR, J., at pages 758, *et seqq* of the report has, after an exhaustive treatment of the subject, shown that the Legislature did not intend to empower the Board of Revenue to revise the action of a Collector who has given a certificate under section 40 (1) (a) or section 42 (1), and that the right construction to be placed upon action 56 is that the Board can control the powers of the Collector exerciseable under those provisions only before such powers have been actually exercised. Once they are actually exercised, the matter becomes final and there is no longer any "case" which may be referred under section 57. The power conferred on the Board by section 56 is that of "control" which implies a thing being done or to be done and not that which has already been done. The meaning of the word "control" given in Stroud's Judicial Dictionary, 2nd Edition, page 397, and the cases cited therein show that the application of the word is confined to proceedings so long as they are actually going on. The word signifies administrative control rather than judicial control. Section 59 (2) also shows that the reference under section 57 contemplates that there is a case to be disposed of, i.e., a *pending* case. Section 42 (2) shows that the action of the Collector under sub-section (1) *finally* disposes of the matter. In cases under the Stamp Act the Collector acts as the agent of the Government for the purpose of deciding upon and levying the correct amount of duty. He holds an exactly analogous position under the Land Acquisition Act. Under the latter Act the Government cannot question the correctness of an award made by the Collector, although a private party can do so. Similarly, under the Stamp Act there is no provision under which the decision of a Collector can be questioned if the Government thinks he has levied insufficient duty, although a private party can, under section 45, question such decisions. The decision of the High Court on this reference as to the correct amount of duty payable would be a mere *brutum fulmen*, for the Stamp Act provides no machinery under which the Board can now levy any additional duty or direct the Collector to do so, nor has the Collector any power under the Act to revise or review his own

(1901) I. L. R., 25 Mad., 752. (2) (1901) I. L. R., 25 Mad., 751.

decision and levy more duty. On the question of what is the correct amount of stamp payable on the sale-deed it is submitted that by the sale-deed "property subject to a mortgage has been transferred to the mortgagee" and the case therefore comes within the proviso to section 24. The ruling in I. L. R., 29 Bom, 203, becomes unintelligible where the mortgagor sells a part of the mortgaged property in satisfaction of the whole mortgage money or for an amount larger than the mortgage money. The case of *Reference under the Stamp Act*, (1) held that the inclusion in the sale deed of some property which was not included in the mortgage was no bar to the operation of the provision to section 24.

Mr. W. Wallach in reply:—

The interpretation put upon the word "control" in the two cases cited in Stroud's Judicial Dictionary is no guide to the interpretation to be put upon the word as it occurs in section 56 of the Stamp Act. Those cases were decided with special reference to the context in which the word was used in the particular and special Acts. "Stating a case," in section 57, means no more than stating a proposition which has arisen out of something which is already in existence. "In all cases", in section 56, does not mean something like "in all suits," but "in every instance" Sections 56 and 57 are independent of the subsequent sections and are not to be interpreted in the light of any expression contained in section 59. In the case in 4 Bom. L. R., 430, the whole and not a part of the mortgaged property was sold.

KNOX, A C.J.—This is a reference made to this Court by the Chief Controlling Revenue Authority. It is said to be made under the provisions of section 57, sub-section (1) of the Indian Stamp Act, 1889. It is not a case that was referred to the Chief Controlling Revenue Authority under section 56, sub-section (2). Therefore if it falls at all under section 57, sub-section (1), it must be deemed to be a case otherwise coming to the notice of the Chief Controlling Revenue Authority. In its order of reference the Chief Controlling Revenue Authority states it as a case coming to the notice of the Board while scrutinizing the monthly statement of cases of the infringement of the Stamp Law of Agra

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(1) (1902) 4 Bom., L. R. 430.

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submitted by the Collector under Rule 204 of the Stamp Manual.

The point arises whether the record before us is the record of a case within the meaning of section 57, sub-section (1). The questions involved, so far as stamp duty is concerned, have been before the Collector of Agra under section 38 (2) of the Stamp Act. The Collector has held that the sale-deed in question was not sufficiently stamped, that the deficit stamp duty payable amounted to Rs. 4. This deficit duty he had levied, together with a penalty of Rs. 5, under section 40, sub-section (1), clause (b), of the Act. We understand that the deficit duty and the penalty have both been paid. This is in accordance with the statement made by the Chief Controlling Revenue Authority. Presumably, therefore, the Collector has certified by endorsement upon the deed that it is now duly stamped. Under section 40, sub-section (2), this certificate is for the purposes of the Indian Stamp Act conclusive evidence of the matter stated therein. The case before the Collector has been fully decided and there appears to be no room for any further disposal in accordance with section 59, sub-section (2) of the Indian Stamp Act. The very same point that is before us came before the Madras High Court. (See *Reference under Stamp Act section 57*, reported in I. L. R., 25 Mad., 752). The learned Judges before whom the reference came were divided in their opinion. Two of the learned Judges arrived at the opinion that section 57 of the Indian Stamp Act did not give the High Court jurisdiction, as there was nothing regarding which the High Court could be asked to pronounce judgement. The learned CHIEF JUSTICE took a contrary view. After the hearing of arguments addressed both by the learned vakil for Khub Chand and the Government Advocate, I am of opinion that the view taken by the Madras High Court was the correct view and that this is not a case within the meaning of section 57. No definition of the word "case" has been cited in the argument on either side and I know of no definition by the Indian Courts upon the meaning of this word. I find on referring to Wharton's Law Lexicon, 11th Edition, page 147, that the word "case" is defined, as (1) a trial, (2) a trial involving some point of law so important as to be published in the Law Reports as a precedent.

This confirms me in the view I have taken and I would return this reference to the Chief Controlling Revenue Authority with the opinion that the matters referred are, under the circumstances, not within the jurisdiction of this High Court.

RAFIQ, J --I agree.

PIGGOTT, J --I agree.

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Reference answered accordingly.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

ANT RAM (PLAINTIFF) v. MITHAN LAL AND ANOTHER (DEFENDANTS)*
*Act No IX of 1887 (Provincial Small Cause Courts Act), schedule II,
article 41—Decree for maintenance against the persons, two of whom were
made liable only in case of default by the third—Suit to recover proportionate
amount of payments made—Suit cognizable by a Court of Small Causes.*

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A decree was passed against three brothers for payment of a maintenance allowance to the widow of a fourth brother deceased. It was, however, provided by the decree that one of the three, Ant Ram, should alone be primarily liable for payment of the allowance, and the others only in case of default being made by Ant Ram. Ant Ram, having made certain payments, sued to recover a proportionate part thereof from the other brothers. *Held* that the suit was not one for contribution; but was a suit cognizable by a Court of Small Causes *Mavula Ammal v. Mavula Maracoi* (1) and *Ramaswami Pantulu v. Narayanamoorthy Pantulu* (2) followed. *Fatima Bibi v. Hamida Bibi* (3) referred to.

IN this case a decree was passed in 1910, against three brothers for payment of a maintenance allowance at the rate of Rs. 10 per mensem to the widow of a fourth brother then deceased. But the court which passed the decree included in it an express direction that one of the brothers, Ant Ram, should alone be liable for the payment of the allowance, the liability of the others only arising in case of default being made by Ant Ram. Ant Ram, having paid the allowance decreed for some time, sued his brothers for recovery, as their proportionate share thereof, of a sum of Rs. 340. The court of first instance decreed the claim in full, but on appeal the amount decreed was considerably

* Second Appeal No. 149 of 1916, from a decree of B. C. Forbes, Subordinate Judge of Muttra, dated the 7th of December, 1915, modifying a decree of Gauri Prasad, Munsif of Mahaban, dated the 27th of January, 1915.

(1) (1906) I.L.R., 30 Mad., 212. (2) (1906) 14 M.L.J., 480.

(3) (1915) 13 A.L.J., 452.

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reduced Ant Ram thereupon appealed to the High Court. When the appeal came on for hearing a preliminary objection was raised to the effect that the suit was one cognizable by a Court of Small Causes and therefore no second appeal lay.

The Hon'ble Munshi *Narayan Prasad Ashthana*, for the appellant.

Mr. *M. L. Agarwala*, for the respondents.

PIGGOTT and WALSH, JJ. :—This is a second appeal by a plaintiff, whose suit to recover from the two defendants, his own brothers, a sum amounting to Rs. 340, after having been decreed by the court of first instance, has been decreed in part only by the lower appellate court. The sum covered by this appeal is Rs. 190. On behalf of the defendants respondents a preliminary objection was raised to the effect that the cognizance of this appeal is barred by section 102 of the Code of Civil Procedure. We have to determine whether the suit brought by the plaintiff, Ant Ram, was or was not one of a nature cognizable by a Court of Small Causes. It was a simple claim for money to an amount falling short of Rs. 500, and therefore fell within the cognizance of a Court of Small Causes, unless excluded by some article in the second schedule of the Provincial Small Cause Courts Act, No. IX of 1887. There is really one article alone (article 41) about which there can be any substantial argument. Something has been said about articles 38 and 40, but they are so clearly inapplicable that we need not mention them further. On behalf of the appellant it is contended that the suit in question was a suit for contribution and that it was brought by himself, either as a sharer in joint property in respect of a payment made by him of money due from a co-sharer, or in the alternative made by him as a manager of joint property on account of the said property. As a matter of fact the question raised by this preliminary objection is one which we should have to consider in one form or another at the hearing of the appeal itself, because the only question decided against the plaintiff has been one of limitation, and in order to determine the question of limitation it would be necessary to determine the nature of the suit as brought. We have come to the conclusion that the preliminary objection must prevail, as the suit in question is not a suit for

contribution at all within meaning of article 41 aforesaid and cannot be held to be concerned with joint property within the meaning of that article. The somewhat peculiar circumstances out of which the litigation arises need not be gone into at length. The essential point is that a decree was passed on the 15th of February, 1910, against all the three brothers who were parties to the present suit in favour of Musammat Basanti, the widow of a previously deceased brother. The object of that decree was to secure to this lady maintenance at the rate of Rs. 10 per mensem chargeable on the whole of the property which had belonged to the father of the three defendants. In consequence, however, of certain antecedent circumstances which need not be gone into, the court thought fit to include in its decree an express direction that the present plaintiff, Ant Ram, should alone be liable for the payment of the money. The consequence of this is that the liability of the property, and therefore the liability of the remaining defendants, could not come into existence except in the event of failure on the part of Ant Ram to comply with the terms of the decree. We do not think there is any getting away from the fact that, at the time when he made the payments which formed the basis of his cause of action, Ant Ram alone was liable to make them under the terms of the decree. No doubt, under the peculiar circumstances, the fact of his making these payments gave rise to an equity in his favour as against his two brothers, and this equity has been recognized by the decree passed in the courts below. The fact remains nevertheless that the suit as brought cannot be treated as one for contribution and therefore was not excluded from the cognizance of a Court of Small Causes. For authorities on this point it is sufficient to refer to two judgements of the Madras High Court, *Mavula Ammal v. Mavula Maracoir* (1) and *Ramaswami Pantulu v. Narayanamoorthy Pantulu* (2). We were referred in argument on the other side to a case of this Court *Fatima Bibi v. Hamida Bibi* (3); but that case is fully reconcileable with the Madras authorities, and indeed proceeds on the same principles of law. What the learned Judge of this Court who decided

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(1) (1909) I.L.B., 30 Mad., 212. (2) (1909) 14 M.L.J., 480.

(3) (1916) 13 A. L. J., 452.

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that case laid stress upon was that the liability which the plaintiff had satisfied was a joint liability as between himself and the defendants at the moment when the payment was made moreover, a liability attaching to a joint tenancy and therefore attaching to property jointly held by the parties to the suit. It was therefore a suit for contribution in the full sense of the word. We hold accordingly that no second appeal lies in this case and we dismiss this petition of appeal accordingly with costs.

WALSH, J.—I entirely agree. One thing is quite clear that it is only suits for contribution of a peculiar and special character which are included in this exemption. If what is ordinarily known as a suit for contribution was intended to be exempted nothing would have been easier than to say so. I think it must be taken that a litigant who wants to bring himself within article 41 must clearly establish that his suit in every respect complies with the very precise definition.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Justice Sir Pramada Charan Banerji.

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 December, 13.

EMPEROR v. LIAQAT HUSAIN AND OTHERS, *

Criminal Procedure Code, sections 303 and 437—Complaint—Summary dismissal of complaint—Order for further inquiry made without notice to show cause being given to accused.

Held that it is not necessary to the setting aside of an order under section 203 of the Code of Criminal Procedure, where the person against whom the complaint was made has never been called on to appear, that notice to show cause should be given to such person. *Angan v. Ram Pirbhan* (1) and *Hari Dass Sanyal v. Saritulla* (2) followed.

IN this case a complaint was made by one Ganga Sahai against Liaquat Husain and others charging them with offences under sections 342, 323 and 454 of the Indian Penal Code. The magistrate before whom the complaint was filed examined the complainant and ordered an inquiry under section 202 of the Code of Criminal Procedure by a magistrate of the third

* Criminal Revision No. 850 of 1917, from an order of W. F. Kirton, Sessions Judge of Aligarh, dated the 15th of September, 1917.

(1) (1912) L. L. R., 35 All., 73. (2) (1887) L. L. R., 15 Cal., 608.

class. A report was made by that magistrate, and as a result of that report the complaint was dismissed under section 203 of the Code without issuing any notice to the persons against whom the complaint was made. Upon application made to the Sessions Judge, he set aside the order of dismissal and directed that the case should be tried by another magistrate. Before making his order the Sessions Judge did not issue notice to the accused persons to show cause why the order of dismissal should not be set aside. Upon the ground of such omission the accused persons applied in revision to the High Court to have the Sessions Judge's order set aside.

Mr. C. Dillon and Mr. C. Ross Alston, for the applicants.

Mr. G. P. Boys, Mr. G. W. Dillon and Mr. J. M. Banerji, for the opposite party.

BANERJI, J—The applicants in this case were charged under sections 342, 323 and 454 of the Indian Penal Code by one Ganga Sahai who filed a petition of complaint in the court of a magistrate of the first class. The magistrate apparently after examining the complainant ordered an inquiry under section 202 of the Criminal Procedure Code by a magistrate of the third class. A report was made by that magistrate and as a result of that report the complaint was dismissed under section 203 without issuing any notice to the persons against whom the complaint was made. Upon application made to the learned Sessions Judge, he set aside the order of dismissal and directed that the case should be tried by another magistrate. Before making his order he did not issue notice to the accused persons to show cause why the order of dismissal should not be set aside. On the strength of this omission the present application for revision has been made and the only contention put forward on behalf of the applicants is that the court ought to have issued notice to them, and for not having done so its order ought to be set aside. It is conceded that the order of the learned Sessions Judge is not illegal by reason of his omission to issue notice, but it is urged that as the order was to the prejudice of the applicants, notice ought to have been issued. No doubt it has been held in this Court that when an order is made to the prejudice of an accused person, it is desirable that he should be afforded an opportunity

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of showing cause against the making of the order, but this rule has been held to have certain limitations. Where the accused person was not called upon to appear in the court below in the first instance and where an order was only made under section 203, the issue of a notice was unnecessary. This was held by Mr. Justice TUDBALL in *Angan v. Ram Pirbhan* (1). The learned Judge observed:—"In my opinion a notice to a person against whom a complaint is made is quite unnecessary where it is sought to set aside the summary order in a proceeding to which he was actually no party," and he held that the cases in which a notice was necessary before an order could be made to the prejudice of an accused person were cases in which after an accused person was tried and discharged a further inquiry was ordered behind his back and without notice to him. A similar view was held in the Calcutta High Court by certain of the Judges who decided the case of *Hari Dass Sanyal v. Saritulla* (2). In the course of his judgement Mr Justice PRINSEP observed:—"A notice certainly would not be necessary before an order to set aside an order of dismissal under section 203 could be passed, since that order was not passed with a notice to the accused person or in his presence and therefore is probably unknown to him." The learned CHIEF JUSTICE made remarks to the same effect at page 617. In view of these authorities, from which I see no reason to differ, I do not think that the application is sustainable and that notice was necessary. I accordingly reject the application and discharge the order staying proceedings.

Application rejected.

Before Justice Sir George Know.

EMPEROR v. LALJI AND OTHERS *

1917
December, 14

Criminal Procedure Code, sections 107, 125, 438—Security to keep the peace—Revision—Jurisdiction of Sessions Judge and High Court.

A Magistrate of the first class ordered certain persons to give security for keeping the peace. The persons to be bound over applied to the Sessions Judge to revise the order. The Sessions Judge was of opinion that the applicants should not have been bound over and accordingly referred the case to the High

* Criminal Reference, No. 1014 of 1917.

(1) (1912) I. L. R., 35 All., 78. (2) (1887) I. L. R., 15 Cal., 608

Court with a recommendation that the order should be set aside—*Held* that the order having been passed by a Magistrate subordinate to the District Magistrate, the record should, under section 125 of the Code of Criminal Procedure, have been laid before the District Magistrate to deal with the matter.

Where a Code gives a particular court jurisdiction to act in certain matters, it is that court which should be applied to and not the High Court *Banarsi Das v. Partab Singh* (1) referred to.

THIS was a reference made by the Sessions Judge of Bareilly in the following circumstances. Three persons were ordered by a magistrate of the first class under sections 107 *et seqq* of the Code of Criminal Procedure to give security for keeping the peace. Against this order the persons affected thereby applied in revision to the Sessions Judge. The Sessions Judge went into the reasons given by the magistrate for passing his order and came to the conclusion that the applicants should not have been bound over, and that the order of the magistrate ought to be set aside. He accordingly sent the record to the High Court with a recommendation that the order should be so dealt with.

The parties were not represented

KNOX, J.—A magistrate of the first class in Bareilly ordered three persons to execute a bond for keeping the peace. The persons so bound applied to the Sessions Judge for a revision of this order. The learned Sessions Judge went into the reasons set out by the magistrate for passing his order and came to the conclusion that the applicants should not have been bound over, and that the order binding them over should be set aside. He considered that under the ruling *Banarsi Das v. Partab Singh* (1), this could only be done by reference to this Court. He has accordingly sent the case up with a recommendation that the order be set aside. The case before me, however, differs from the case of *Banarsi Das v. Partab Singh* (1). In this last case the District Magistrate had treated it as though it were an appeal and had cancelled the order of the lower court. It was held that the order of the District Magistrate was void as an order passed without jurisdiction. There is no sign, however, that the case before me is a case of an appeal from an order of the magistrate of the first class. It appears to me that the District Magistrate

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(1) (1912) I, L. R., 85 All., 103.

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has power at any time for sufficient reasons to be recorded in writing to cancel any bond for keeping the peace provided that the bond be one given in obedience to an order of a court in his district not superior to his court. In the present case the magistrate who passed the order was a magistrate subordinate to the District Magistrate, and I agree entirely with what was said in the concluding sentence of this Court's judgment in *Banarsi Das v. Partab Singh* (1), thus far, namely:—"The matter is one concerning the peace of the district, and I think it advisable in the circumstances of the case that the record should be placed before the present District Magistrate so that he may examine it himself and see whether or not it is any longer necessary to keep the opposite party under his bond." I see nothing in the words contained in section 125 of the Code of Criminal Procedure to prevent the District Magistrate from cancelling the bond for reasons other than that the persons bound over can be released without hazard to the community or any other person. Where a Code gives a particular court jurisdiction to act, it has been held by this Court on several occasions that it is that court which should be applied to and not this Court. I decline to interfere, but direct that the record be laid before the District Magistrate in order that he may, if he thinks fit, deal with it under section 125 of the Code of Criminal Procedure.

Order upheld.

REVISIONAL CIVIL.

Before Mr Justice Muhammad Rafiq.

DRIGPAL SINGH (PLAINTIFF) v. KUNJAL (DEFENDANT). *

1917
 December, 15.

Act No IX of 1887 (Provincial Small Cause Courts Act), Schedule II, Article 81—Suit for mesne profits of a grove—Jurisdiction.

Held that a suit for recovery of mesne profits of a grove from which the plaintiff had been wrongfully dispossessed is a suit the cognizance of which by a Court of Small Causes is barred by article 81 of schedule II to the Provincial Small Cause Courts Act, 1887. *Prasadi Lal v. Imdad Husen* (2) distinguished *Sheo Badi v. Surjan* (3) followed.

THE plaintiff instituted in the Court of Small Causes a suit for the recovery of Rs. 60 on account of the wrongful use of his

* Civil Revision No. 194 of 1917.

(1) (1912) I. L. R., 85 All., 103 (2) Weekly Notes, 1898, p. 10.

(3) (1913) 11 A. L. J., 238.

land by the defendant, who had wrongfully taken possession of it and cultivated it. The Judge returned the plaint for presentation to the proper court holding that the case fell within article 31 of the second schedule of the Provincial Small Cause Courts Act. The plaintiff applied to the High Court in revision.

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Munshi *Purushottam Das Tandon*, for the applicant, contended that the suit was cognizable by the Small Cause Court. The case is on all fours with the case of *Kunjo Behary Singh v. Madhub Chundra Ghose* (1) in which it was set out in the plaint that the defendant had dispossessed the plaintiff and it was against the defendant in possession that mesne profits were claimed. This case has been consistently followed by later Calcutta cases. A suit to recover damages on account of the wrongful eviction of the plaintiff from immovable property is not a suit falling within article 31 of the second schedule of Act IX of 1887, though the profits of the property may be the measure of the damages claimed; *Prasadi Lal v. Imdad Husen* (2). This is a Division Bench ruling of this Court and follows the Calcutta Full Bench case. A later ruling of our Court is certainly against my contention, but in that case it does not appear that either of the two cases cited above were cited. Moreover, it is a single Judge case; *Sheo Bodh v. Surjan* (3).

Munshi *Mangal Prasad Bhargava*, for the respondent, was not called upon.

MUHAMMAD RAFIQ, J. :—This is an application in revision from the order of the Small Cause Court at Fatehpur returning the plaint to be presented to the proper court. It appears that the plaintiff applicant sued to recover mesne profits of a grove from which he said he had been wrongfully kept out of possession for three years by the opposite party. The learned Judge considered that the claim of the applicant fell under article 31, schedule II, of the Small Cause Courts Act, and was not therefore cognizable by him. He accordingly returned the plaint for presentation to the proper court. He is supported in the view of the law he has taken by a case of this Court viz., *Sheo Bodh v. Surjan* (3), as

(1) (1896) I. L. R., 23 Cal., 884. (2) Weekly Notes, 1898, p. 10.

(3) (1919) 11 A. L. J., 238.

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also by several cases of the Bombay, and the Madras High Courts. For the applicant reliance is placed on the Full Bench Ruling of *Kunjo Behary Singh v. Madhub Chundra Ghose* (1). The view taken by the Calcutta High Court seems to have been adopted by this Court about eighteen years ago in the case of *Prasadi Lal v. Imdad Husen* (2). The facts of that case are not quite the same as those of the present case. In the case of *Prasadi Lal v. Imdad Husen* (2), the plaintiff had sued for damages for wrongful eviction. In the present case the plaintiff is suing for the mesne profits of the property from which he was kept out of possession for three years. The case of *Prasadi Lal* does not apply to the present case. The application fails and is dismissed with costs. Let the original plaint be returned.

Application rejected.

REVISIONAL CRIMINAL.

1917
December, 15.

[Before Mr. Justice Tudball.

EMPEROR v. RAM SAHAI*

Criminal Procedure Code, sections 439 and 476—Revision—Jurisdiction of High Court—Order for prosecution passed by District Magistrate instead of by Collector acting as a Court of Revenue.

The Collector of a district in deciding a Revenue appeal came to the conclusion that a receipt filed in the case was not genuine. He took no action at the time as a Court of Revenue, but subsequently acting as District Magistrate he held an inquiry into the matter of the receipt and sent the person whom he thought to be concerned with the making of the receipt to a subordinate magistrate for trial. *Held* that the High Court had jurisdiction to interfere in revision and that the order passed by the District Magistrate was *ultra vires*.

THE facts of this case were as follows :—

There was a *lambardari* case pending in appeal in the court of the Collector of Farrukhabad. The present applicant Ram Sahai had been appointed by a subordinate court as *lambardar* and the opposite party had appealed against the order. The opposite party pleaded that Ram Sahai was in debt, that his estate was burdened, and that he should not be

*Criminal Revision No. 888 of 1917, from an order of O. L. Alexander, District Magistrate of Farrukhabad, dated the 11th of October, 1917.

(1) (1896) 1 L. R., 28 Cal., 884, (2) Weekly Notes, 1898, p. 10,

appointed. He pleaded that he had paid up a considerable part of the debt, and in order to establish it he produced a receipt for Rs. 450, dated the 20th of December, 1911, and bearing on it a one anna postage stamp which bore the effigy of King George V. The Collector came to conclusion that the receipt was not genuine on the ground that the stamp which was affixed to it was not obtainable in the district on the 20th of December, 1911. Ram Sahai explained that the stamp had been affixed to the receipt a year after the execution of the document itself. The Collector came to the conclusion that Ram Sahai should not be appointed and he passed orders accordingly on the 5th of September, 1917. Under his order deciding the appeal he wrote the following order :—" I propose to make further inquiry into the matter of the receipt as District Magistrate. I order that Kashi Ram, Indarjit and Jaisukh be summoned to my court on September 25th, and direct that Ram Sahai execute a bond in Rs. 100 for his appearance on that date." A separate record was commenced, in the forefront of which there is a vernacular translation of this order, in which it is distinctly set out that Mr. Alexander, in his capacity as District Magistrate, was taking up this matter. He passed orders on the 11th of October, as follows :—" Ram Sahai appears to be guilty of an offence under section 471 of the Indian Penal Code, and I send this record to Mr. Mahadeo Prasad for necessary action together with Ram Sahai. "

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Against this order Ram Sahai applied in revision to the High Court.

Babu *Satya Chandra Mukerji*, for the applicant.

The Assistant Government Advocate, (Mr. *R. Malcomson*) for the Crown.

TUDBALL, J.:—The facts of this case have one peculiarity about them. Briefly stated they are as follows. There was a *lambardari* case pending in appeal in the court of the Collector of Farrukhabad. The present applicant Ram Sahai had been appointed by a subordinate court as *lambardar* and the opposite party had appealed against the order. The opposite party pleaded that Ram Sahai was in debt, that his estate was burdened, and that he should not be appointed. He pleaded that he had

must be set aside. I would point out that if the Collector of the district had taken action under section 476 of the Criminal Procedure Code and had made a complaint, then this Court would have had no jurisdiction to interfere with his order. At first I was under the impression that Mr. Alexander had acted in his capacity as the Presiding Officer of a Revenue Court of appeal, but I am faced with the clear statement in his order that he is acting in his capacity as District Magistrate and not as a Collector. I therefore allow this application. I set aside the order of the District Magistrate. It will be open to the Collector of the district to take any action which he may deem necessary in the matter according to law.

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Application allowed.

REVISIONAL CIVIL.

Befo e Mr. Justice Walsh

IN THE MATTER OF THE PETITION OF BISHESHAR NATH *

Civil Procedure Code (1908), order VI, rule 14—Procedure—Plaint—Distinction between signature of plaintiff and authorization of suit—Suit filed on behalf of a person in jail.

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 December, 19.

Order VI, rule 14, of the Code of Civil Procedure, which requires a pleading to be signed by a party, is merely a matter of procedure. It is the business of the Court to see that this provision is carried out. It is also the business of the Court to see that a suit is authorized by the plaintiff. The authority for the bringing of a suit is a question of principle. But where a suit is duly authorized, the proper signing of the plaint is a matter of practice only, and if a mistake or omission has been made, it may be amended at any time. *Basdeo v. John Smidt* (1), *Rajni Ram v. Katesar Nath* (2) and *Gropper v. Smith* (3) referred to.

The mere fact that the signing of a plaint by or on behalf of a plaintiff who was in jail at the time might have involved a breach of jail regulations has nothing to do with the question of the validity or invalidity of the plaint.

THE facts of this case were as follows :—

A suit was brought by one Chajju Mal against Jas Ram upon a promissory note for Rs. 150 alleged to have been given by the defendant on the 31st of December, 1913. The plaint was filed

* Civil Revision No 178 of 1917.

(1) (1899) I. L. R., 22 All., 55. (2) (1896) I. L. R., 18 All., 396.

(3) (1884) 26 Ch. D., 700.

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on the 22nd of December, 1916, and the claim was for Rs. 216-14. The written statement raised objection to the validity of the plaint, the main ground being that the plaintiff was in jail at the time the plaint was signed, and that it had been signed without permission of the jail authorities having been first obtained as required by the jail regulations. Various witnesses were examined, but the one witness whom the Munsif refused to examine on this point was the plaintiff himself, although he was in the witness-box. The Munsif appeared to consider that both the plaint and the *vakalatnama* filed by the vakil who appeared for the plaintiff were documents of a highly suspicious nature, and that, if not an actual forgery, the plaint was at any rate signed in circumstances which involved a breach of the jail regulations, and that the plaintiff's vakil was a party to these proceedings. He accordingly passed an order directing the vakil to show cause why he should not be committed to the criminal court under section 476 of the Code of Criminal Procedure, and also directing him to show cause why proceedings should not be taken against him under section 14 of the Legal Practitioner's Act. Against this order the present application in revision was made to the High Court.

The Hon'ble Pandit *Moti Lal Nehru*, The Hon'ble Dr. *Tej Bahadur Sapru*, Babu *Salva Chandra Mukerji* and Munshi *Gulzari Lal* for the applicant.

Mr. *A.E. Ryves*, for the Crown.

WALSH, J. :—These are two applications by Bisheshar Nath, High Court Vakil, practising at Ghaziabad, against an order of the Munsif of Ghaziabad, which was really a judgement in a civil suit, (a) directing him to show cause why he should not be committed to the criminal court under section 476 of the Criminal Procedure Code, and also (b) directing him to show cause why proceedings should not be taken against him under section 14 of the Legal Practitioner's Act.

The circumstances of the case are unusual. A suit was brought in the court of the Munsif by one Chajju Mal against Jas Ram upon a promissory note alleged to have been given by the defendant on the 31st of December, 1913, for Rs. 150, with interest at Re. 1-4 per cent. per mensem. The claim was for Rs. 216-14,

only. The plaint was filed about the 22nd of December, 1916, and the claim would therefore have been barred in a few days.

Paragraph 2 of the written statement alleged that the plaintiff was in jail, that the suit had not been presented on his behalf, and that the permission of the jail authorities had not been given to the plaintiff's signature. The following issue was framed :—
I. " Whether the suit was properly and duly filed on behalf of the plaintiff and is maintainable or not. " The Munsif describes it as the most important issue in the case.

Bakhtawar Singh, brother-in-law of the plaintiff, was called and swore that he was asked by the plaintiff's wife, in consequence of a letter written by the plaintiff from jail, to file the suit, and he accordingly instructed the applicant, Bisheshar Nath, Hardwari Lal, the plaintiff's munim, called by the defendant, attempted to identify the plaintiff's signature, but he was not certain about it. A jailor was called by the defendants who contradicted the statement of Bakhtawar Singh that the plaint was signed by the plaintiff in the presence of the jail authorities, though he stated that about the date in question, two or three people called to see Chajju Mal who was at work outside the jail, and the signature might have been obtained in the jailor's absence.

These witnesses, whose evidence was recorded on the 14th of February and the 13th of April, are the only relevant ones upon the point as to the manner in which the plaintiff's signature was obtained.

On the 19th of April, the plaintiff himself was put into the box and was asked the question " Who signed the plaint in this case ? " After a highly technical discussion about the *onus* of proof which I confess is beyond my comprehension, the question was disallowed. So that issue No. 1 was decided after the deliberate refusal to hear the evidence of the principal person concerned who was in a position to speak to it. To talk of forgery under such circumstances is of course out of the question.

I will assume that the plaintiff's signature was appended so as to constitute a breach of the jail regulations. I will assume further, though it is by no means proved, that he did not write it himself, although he had authorized the suit, and that although

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he might have authorized some one to sign his own name, he was prepared, or badly advised, under a mistaken fear of the consequences of telling the truth, to commit perjury by swearing that a signature written by some one for him was written by himself. There is not, so far as I can see, in the absence of a repudiation of his signature by the plaintiff himself, a scrap of evidence of forgery, and not a shadow of a suggestion in the evidence that the present applicant knew it was forged.

The learned Munsif appears to have felt the difficulty himself. He says the signatures of the plaintiff to the plaint and *vakalat-nama* were "most probably forged." He further concludes that the applicant was guilty of gross negligence in not concluding that there had been a breach of the jail regulations. It is impossible to reconcile this finding with the ultimate conclusion that the applicant produced two documents in court which he either knew or had reason to believe were forged. Without considering whether the Munsif had jurisdiction to deal with any disciplinary question under the Legal Practitioner's Act, or whether the occasion was one in which, in any event, he ought to have exercised the power given by section 476 of the Criminal Procedure Code, I hold that on the evidence before him the course which the Munsif took with the *vakil*, the present applicant, had no foundation in fact and was an unwarrantable abuse of his power, and an irregular exercise of jurisdiction.

As, however, the judgement in this case raises several points of practical importance and the whole proceedings evidence a lamentable waste of judicial time, and a fruitless expenditure of costs, all of which apparently will fall upon one or another of these two unfortunate litigants, I think it desirable to deal with the other points raised.

The Munsif has entered into a learned and exhaustive examination of the Jail Manual and Regulations. These are wholly irrelevant. He says they have the force of law. This does not mean that they alter the general law. A plaint signed or a suit authorized, by a man in jail, is just as good as any other plaint or suit, however many jail regulations are broken. The breach of regulations whether by the prisoner, his friends or

pleader, are matters for the Jail authorities, or the Local Government, or whoever has the duty of enforcing them or punishing their breach. They no doubt have the force of law, but they cannot destroy a cause of action or invalidate a plaint. The second part of the second plea in the written statement which raised this point ought to have been struck out and no issue should have been framed thereon.

Order VI, rule 14, which requires a pleading to be signed by a party, is merely a matter of procedure. It is the business of the court to see that this provision is carried out. It is also the business of the court to see that a suit is authorized by the plaintiff. Of course if it is not, the suit ought to be dismissed and the persons responsible for it made to answer for their conduct. The authority for the bringing of a suit is a question of principle. But where a suit is duly authorized, the proper signing of the plaint is a matter of practice only, and if a mistake or omission has been made, it may be amended at any time. Sections 151 and 153, which the courts below seem too often to ignore, were plainly intended for such cases. And the latter part of order VI, rule 14, enabling a person duly authorized by the party when the party is unable to sign the pleading himself to sign for him makes this clear. In the present case I see no reason why Bakhtawar Singh could not have signed for the plaintiff. I delivered a judgement recently myself upon this very point where I endeavoured to make it clear. But there is abundant authority, if any were required, for such an obvious proposition; cf. *Basdeo v. John Smidt* (1) decided in this Court many years ago.

But the most unfortunate incident of the whole case is the proceeding of the 19th of April, when the plaintiff presented himself in the box, and the Munsif disallowed a most obvious, necessary and proper question. Why the Munsif did not then realize the position, and put an end to further waste of time and invite the plaintiff to sign the plaint and *vakalatnama* then and there, I am at a loss to understand. The fact that a fresh suit would probably be barred by limitation would seem an additional reason for doing so.

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I have not thought it necessary to discuss the high technicalities about the attestation of the *vakalatnama*. All defects might and ought to have been cured by the exercise of a little common sense, and may, in my opinion, still be cured if the suit is remanded or the court which hears the suit in appeal does what the Munsif might and ought to have done. *Vide Rajit Ram v. Katesar Nath* (1).

It cannot be impressed too often upon the inferior courts what BOWEN, L. J., said in *Cropper v. Smith* (2):—"The object of courts is to decide the rights of parties, and not to punish them for mistakes which they make in the conduct of their cases, by deciding otherwise than in accordance with their rights. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy."

Of course where it is sought to abuse the process of the court, or to overreach the other party by some fraud, it is another matter.

It is to be observed that, although according to the Munsif's judgement the defendant admitted his signature to the note so that the *onus* was upon him, and the plaintiff gave evidence and the defendant did not, but relied upon a discharged servant of the plaintiff, the Munsif dismissed the suit on the merits. If he was right in so doing there was the less reason for this elaborate expenditure of time and money over a trivial matter of Rs. 200. The defendant and his representatives are partly to blame for this unfortunate miscarriage by having raised the question in their plea, apparently because the plaintiff, who was a former employer of the defendant, had been sent to jail. If there was a good defence to the suit, it was superfluous. If there was no defence, it was irrelevant to any question, unless the suit had not been authorized by the plaintiff. This, which is the sole question of importance, has not been decided at all.

I will merely add that it would in my opinion be better, as a general rule, where the court has reason to think that there has been any breach of professional etiquette or any matter calling for the exercise of disciplinary powers, in the conduct of the pleader or advocates in the case, to decide the merits, and reserve

(1) (1896)-I. L. R., 18 ALL, 396. (2) (1884) 26 Oh. D., 700.

any such question for further consideration after the disposal of the suit. If there were no other reason for this course, and there are several in my judgement, it is in any case not a matter which concerns the parties, or one in respect of which they ought to be penalized either by prolonging the suit or increasing the costs. This case seems to have occupied the time of the court on six days, including the framing of the issues and the delivery of judgement, and lasted for more than six months. I direct the order of the Munsif, so far as it affects the applicant, to be cancelled.

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Order set aside.

Before Mr. Justice Walsh.

IN THE MATTER OF THE PETITIONS OF KALKA PRASAD AND OTHERS *
Act No. XVIII of 1879 (Legal Practitioners' Act), section 36—Touts—Procedure to be followed by a court taking action under section 36—Revision—Statute 5 and 6 Geo. V, Ch. 61, section 107—Evidence—Criminal Procedure Code, section 117 (3).

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It is competent to the High Court to entertain an application in revision against an order passed by a District and Sessions Judge under section 36 of the Legal Practitioners' Act, 1879, and this without invoking the aid of the Government of India Act, 1915, section 107. *In the matter of the petition of Madho Ram (1), In the matter of the petition of Kedar Nath (2), Bavu Sahib v. the District Judge of Madurai (3) and Hari Charan Sircar v. the District Judge of Dacca (4)* referred to.

In a proceeding under section 36 of the Legal Practitioners' Act, 1879, the court may properly apply, as regards the nature of the evidence admissible the provisions of section 117 (3) of the Code of Criminal Procedure.

Where a person's name has once been included in a list framed under section 36 the mere fact that the exhibition of such list in any particular court room is discontinued has no effect on the validity of the original order.

AT the instance of the Bar Association of Meerut the District Judge instituted proceedings under section 36 of the Legal Practitioners' Act, 1879, against several persons alleged to be touts, and on the 4th of May, 1917, he passed an order directing that the names of six persons, Abdur Rahim, Iftikhar Husain, Nisar Ahmad, Rup Chand, Abdul Karim and Kalka Prasad, along with certain others, should be posted and put on a list of touts according to the provisions of the section. The persons

* Civil Revision No. 170 of 1917.

- (1) (1899) I. L. R., 21 All., 181 (2) (1908) I. L. R., 31 All., 59.
(3) (1903) I. L. R., 26 Mad., 596. (4) (1910) 11 C. L. J., 518.

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whose names are mentioned above applied in revision to the High Court against this order.

Mr. *A. P. Dube*, and Babu *Satya Chandra Mukerji*, for the applicants.

Mr. *A. E. Ryves*, for the Crown.

WALSH, J :—These are four applications in revision made by six persons, Abdur Rahim, Iftikhar Husain, Nisar Ahmad, Rup Chand, Abdul Karim and Kalka Prasad against an order made by the District and Sessions Judge of Meerut on the 4th of May, 1911, ordering the names of these persons with others to be posted and put on a list of touts under section 36 of the Legal Practitioners' Act. Although the cases of the various applicants are not precisely similar, I propose to deal with all of them in one judgement.

The proceedings were undertaken by the District Judge at the instance of the Bar Association of Meerut, which had sat and considered the matter with great thoroughness and which supported the complaint which they made against the system of touting by a large number of persons with a considerable body of evidence.

The hearing of the case was spread over a considerable period, and the learned Judge devoted great pains to the performance of this difficult but important task. I have to consider in the case of each applicant to this Court how far he is entitled to complain of the order made against him. Before doing so, however, it is necessary to make one or two general observations. While exercising due care to see that each case is fairly made out by the evidence called, and is established in a hearing according to law, it is desirable to emphasize the great importance of this legislation both to the general public and to the legal profession. The Judge has used language none too strong, about the pests who perennially infest the courts. It is common knowledge that systematic touting is inseparable from a great deal of deception and imposition practised upon poor and ignorant litigants, whose interests are subordinated to those of the needy persons who prey upon their credulity. It is also inseparable from unprofessional conduct on the part of those who employ touts. It is only by the vigilant efforts of bodies like the Meerut Bar

Association, and by strict enforcement of statutory safeguards, that the poorer members of the public and the respectable members of the profession can obtain protection.

The nature of the evidence which may legitimately be tendered in such a case does not really admit of much controversy. The learned Judge has held that the recognized principles applicable in cases under section 110 of the Code of Criminal Procedure or the "evil livelihood" section, are applicable here. This is clearly right. Indeed it was admitted at the Bar by both sides in this case, which was well and temperately presented. The Statute says "by general reputation or otherwise." The former of those provisions clearly includes hearsay evidence which may be tested, when admissible, by cross-examination just as other evidence may be tested and challenged. The latter provision "or otherwise" is clearly intended to include all the ordinary modes of proof known to the law which might otherwise be said to have been impliedly excluded, such as personal observation, evidence of conduct, admissions in conversation and the like, proved by first hand testimony. In this case almost every possible kind of evidence was given. I note that none of the alleged touts themselves gave evidence on oath, though I can find nothing in the Statute or in the general law to prevent their doing so if they chose. The Code of Criminal Procedure is not applicable, and there seems no reason in good sense or in the general law to disentitle them to be heard on oath. It is not to be expected that direct evidence of a specific case of consideration passing between tout and employer can be forthcoming, except in the rarest cases. The case quoted to me from the Punjab Record is not in point. The only evidence in that case was a letter of introduction which did not suggest remuneration, and might have been perfectly harmless. But it is a reasonable and legitimate inference of fact that if a man is shown to spend the greater portion of his working hours in canvassing and introducing clients to members of the profession he is not rendering gratuitous service such as a casual friend or acquaintance may do.

In my opinion revision may be entertained in such a case as this. It is "a case in which no appeal lies." I am aware that

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the contrary view has been expressed by some Judges of this Court. *In the matter of the petition of Madho Ram* (1) the point taken was that the finding was against the weight of evidence. That is not a ground for revision, and therefore it was not necessary for the Court to decide more. I do not think that it is necessary to invoke the aid of the superintendence section in the Government of India Act, 1915, though it seems to have been held in *In the matter of the petition of Kedar Nath* (2) that this was one way of questioning orders in this Court. There is no decision binding upon me, and I prefer the view taken in *Banu Sahib v. The District Judge of Madura* (3), where the High Court interfered in revision in a similar case. The matter has been very fully discussed in *Hari Charan Sircar v. The District Judge of Dacca* (4) where it was held that the revisional jurisdiction could only be entertained in the furtherance of justice.

These being the general considerations applicable I now come to the particular case of each applicant before me. In the cases of Rup Chand, Iftikhar Husain, and Abdul Karim there was ample evidence to justify the order. They were constantly seen to be taking clients about, one of them had taken away one case from one of the witnesses; they had been seen to stop clients, hold them in conversation and apparently take charge of them. The evidence as to their general reputation was very strong. It was urged on behalf of Rup Chand, and I think one of the others, that the Judge had erred in refusing to send for files of cases which would have shown that they were legitimately engaged in litigation in which they or members of their family were interested. This might be so, but it would not negative or prove anything inconsistent with the other evidence called against them. The learned Judge was no doubt pressed for time to conclude inquiry before going on leave. He took the right view in assuming that these files would prove what they were alleged to show and that it was superfluous to prove them strictly because they would not alter his view. I see no reason to interfere with the decision in the case of these three applicants and I therefore dismiss their applications.

(1) (1899) 1, L. R., 21 All., 181.

(2) (1908) 1, L. R., 31 All., 59.

(3) (1908) 1, L. R., 26 Mad., 596.

(4) (1910) 11 C. L. J., 513.

The cases of Nisar Ahmad and Abdur Rahim stand upon a somewhat different footing. I have felt some doubt as to whether I ought to interfere even in their cases. I am not prepared to overrule the findings of the learned Judge on a question of fact of this kind, even if I had the power to do so, and it may be that I am stretching the revisional power of this Court in these cases by interfering at all. I only do so because the evidence as recorded in the Judge's note in these two cases is not very strong, and the Judge being admittedly pressed for time and having given reasons in their cases which are not entirely satisfactory, it is just possible that they may have suffered injustice by being, so to speak, swept away in the general current against their co-defendants. Abdur Rahim had been in the employment for one year of Mr. Abdul Bari, a Barrister, against whom the complainants made no suggestion, but who had been temporarily absent from Meerut. Those who mentioned Abdur Rahim said very little about him. Muhammad Husain in cross-examination really spoke in his favour and mentioned that he had returned to Mr. Abul Bari's employment. Gauri Prasad said little or nothing about him. Ghazi Ram mistook him altogether for another.

As to Nisar Ahmad two pleaders were called for the defence. One, with over three years' experience, spoke of him as being regularly in the employment, and constantly seen in the company of Mr. Zamir-ul-Islam, his employer. Mr. Abdullah Shah had nothing to suggest against the latter. Bahal Singh and Ghazi Ram certainly gave positive evidence about his holding clients. Ramji Lal on the whole spoke in his favour. In these two cases the learned Judge's reason, namely, that the evidence did not warrant him in rejecting the considered complaint of the Bar Association is not quite satisfactory. He must form an independent view of his own, though, no doubt, the opinion of the Bar-Association on a matter of general reputation is entitled to very great weight. I am not deciding that his conclusion was wrong. It is a question of fact of which he is a better judge than I. I merely hold that these two applicants have made out a case for further consideration and I remit their cases

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to the learned Judge for consideration and for such final order thereon as he, on hearing any further evidence on either side or of the men themselves, sees fit to make. He can of course take into account the evidence already given. And in the exercise of my discretion I leave it to the learned Judge to decide whether in the cases of these men he will suspend the operation of the list until he is able to take up the further inquiry. Further than this I decline to interfere.

The last case is the case of Kalka Prasad. This case has caused me some difficulty. The applicant was put upon a list in 1908 by the then District Judge of Meerut, the list which gave rise to the decision in I. L. R., 31 All., 59. The District Judge reports that he has repeatedly applied to have his name removed as it was impeding his chances of obtaining work in Delhi, but the District Judge of course had no material on which to act. The applicant undoubtedly wrote to the court on the 9th of February of this year and received what I may accept as an official reply that no list of touts was then affixed. According to the learned Judge it was also not affixed from the long vacation of 1916 and afterwards. It is clear that the list ought to be exhibited. I think sub-section (3) means that the exhibition of the copy list, there referred to, is necessary to constitute a man a proclaimed tout, though it is not necessary for me to decide that point in this case. But upon further consideration I have come to the conclusion that the mere removal or failure to keep the list exhibited in the court of the District Judge of Meerut had not the effect of cancelling the list altogether, inasmuch as it was by the order to be exhibited in all courts subordinate to the District Court, and its mere removal in one court out of many would not *per se* cancel the original order of 1908. The form, however, adopted by the learned Judge in this particular case has caused some embarrassment. He might have made a further list supplementary to the existing list of 1908 and merely ordered his official to restore the list of 1908 to the place from which it should not have been removed. In that event the applicant would have had no grievance. As it is he has the grievance, technical though it may be, that his name has been included in a new list consisting of the old list and the

new names added together by the order of the 4th of May, and before that was done he was given no opportunity of showing cause. In this case again I decline in my discretion to interfere. Though the applicant's name would not be properly upon the new list and ought to be removed, it is not improperly upon the old list. The section gives the Judge the power, from time to time, to alter and amend the list, and under the circumstances, inasmuch as the present applicant is desirous of being heard and may be able to satisfy the learned Judge that if he had been given an opportunity of showing cause, his name would not have been included in the list of the 4th of May, I think the learned Judge might well allow an application by Kalka Prasad, if he sees fit to make it, to have the list altered or amended by the removal of his name on the ground that whatever may have been the case in 1908 he is no longer a tout. The result is that, though feeling some doubt in the matter, I dismiss the application of Kalka Prasad.

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Order modified

PRIVY COUNCIL

SURAJ NARAIN v RATAN LAL AND TWO OTHER APPEALS CONSOLIDATED.

[On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow.]

Hindu Law—Joint family—Mitakshara law—Managing member keeping accounts of joint funds and of his own self-acquired property in same account book—Entries in such books evidence of intention to make self-acquired property joint—Purchases made in name of son-in-law out of funds so blended to provide for son-in-law—Statement to that effect made by manager admissible as being against his own interest—Benami deeds—Civil Procedure Code, 1882, section 317.

With respect to a Hindu joint family the law is that while it is possible that a member of the joint family can make separate acquisitions, and keep moneys and property so acquired as his separate property, yet the question whether he has done so is to be judged by all the circumstances of the case.

Where a member of a joint Hindu family at Lucknow, who had made considerable savings from his earnings as a pleader at Hardoi where he was entrusted with the management of the joint family property at that place, eventually became managing member of the joint family at Lucknow, kept the

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18, 17, 20.

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* *Present* :—The Lord CHANCELLOR [Lord BUCKMASTER], Lord WRENSBURY, and Mr. AMER ALI.

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accounts of the joint property and of his own separate earnings in one account book, and had purchased properties in the name of his son-in-law out of the sums entered in the account book.

Held that by so blending his private savings with receipts and payments on joint account, he showed an intention to make them joint property, and they must be presumed to be joint.

But it did not follow that all purchases entered in the book were made for the joint family. As regarded the purchases in the name of his son-in-law, his statement that they were made to provide for the son-in-law was a statement against his own interest and therefore was admissible in evidence. Such a statement together with the other evidence in the case was sufficient to give the son-in-law a title to the subject of such purchases as against the claim of the joint family.

THREE consolidated appeals 5, 6 and 7 of 1914 from judgments and decrees (30th October, 1909,) of the Court of the Judicial Commissioner of Oudh, which reversed decrees (27th August, 1908,) of the Court of the Additional Judge of Hardoi.

The facts of the case are sufficiently stated in the judgement of the Judicial Committee.

A. M. Dunne for the appellants contended that Ram Narain who, as found by both Courts in India, was the manager of the joint family had in his accounts so mixed his self-acquired property with the funds of the family as to destroy its self-acquired character and make it joint, the burden of proof was consequently on him to show it was not joint. *Luximon Row Sadasew v. Mullar Row Bajee* (1) was referred to. The accounts showed that Ram Narain had not made any distinction between the income derived from his profession and the joint family funds. He also made a statement which supported the inference that the whole property was joint. The purchases made in Ratan Lal's name must be presumed to be benami until it was proved they were not; see *Gopeekrist Gosain v. Gungapersaud Gosain* (2) and *Prankishen Paul Chowdhry v. Mothooramohun Paul Chowdhry* (3). The source from which the purchase money came was the test whether the purchase was benami or not: *Dhurm Das Pandey v. Shama Soondri Dibiah* (4). Reference was made to *Lal Bahadur v. Kinkhaiya Lal* (5) which, it was submitted, governed the present case. It had not been

(1) (1881) 2 Knapp, 60

(3) (1865) 10 Moo I A., 403

(2) (1854) 6 Moo. I A., 53

(4) (1843) 3 Moo. I A., 229 (240)

(5) (1907) I. L. R., 29 All, 244 I. R., 34 I A., 65

proved by Ratan Lal that Ram Narain had made any such gift to him as alleged, nor to his own daughter.

De Gruyther, K. C., and *B. Dube* for the respondent contended that Ratan Lal's method of keeping the joint family accounts did not amount to mixing his own self-acquired earnings with the joint funds so as to make them joint property. The account book produced only showed that he made all entries of sums received and expended in one book: other books which would have shown that his own and the joint funds were kept separately were not produced by the appellants. *Lal Bahadur v. Kanhaiya Lal* (1) was distinguishable, the members of the joint family there were a father and son, and there was one common stock. Ram Narain had absolute power to make use of his professional income in any way he liked, and he chose to expend it for the benefit of his daughter and her children in buying properties in the name of her husband Ratan Lal. These purchases, it was submitted, were not benami transactions. *Gopeekrist Gosain v. Gungapersaud Gosain* (2) was distinguishable on the ground that in the present case all the circumstances showed the intention of Ram Narain that the beneficial interest in these properties should be enjoyed by Ratan Lal and his wife. Reference was made to *Obhoy Churn Mookerjee v. Punchanan Bose* (3); *Rajah Chundernath Roy v. Ramjoy Mozoomdar* (4); *Nawab Azimut Ali Khan v. Jowahir Singh* (5); and *Uman Parshad v. Gandharp Singh* (6), on which the respondent relied.

Dunne replied, distinguishing the case of *Obhoy Churn Mookerjee v. Punchanan Bose* (3) on the ground that it was a case under the Dayabhaga law, and the property therefore belonged to the father, whereas in the present case the property was joint. The statement by Ram Narain in 1899 as to the gift to Ratan Lal was not admissible in evidence; it was not against Ram Narain's interest, and section 32 (3) of the Evidence Act, 1872, was therefore not applicable. Both the Courts in India had held that section 317 of the Civil Procedure Code, 1882.

(1) (1907) I L. R., 29 All., 244; L. R., (4) (1870) 15 W. R., P. C., 7.

34 I. A., 65.

(2) (1854) 6 Moo. I. A., 53.

(5) (1870) 18 Moo. I. A., 404.

(3) (1863) 1 Marshall's Rep., 564.

(6) (1887) I. L. R., 15 Cal., 20; L. R.,

14 I. A., 127.

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precluded the appellants from claiming the properties purchased at auction sales in the name of Ratan Lal: *Bodh Singh Doodhuria v. Gunesh Chunder Sen* (1) and *Sankunni Nayar v. Narayanan Nambudri* (2) were referred to.

1917, January, 30th:— The judgement of their Lordships was delivered by the Lord CHANCELLOR (Lord BUCKMASTER):—

In April, 1867, Bakhshi Bishnu Narain died, leaving four sons, whose names in order of birth are: Raj Narain, Ram Narain, Bakht Narain, and Suraj Narain. The family was Hindu joint family, governed by the Mitakshara law and possessing ancestral property. Accordingly, upon his father's death the eldest son, Raj Narain, became karta, and so continued until his death in August, 1890. His brother, Ram Narain then succeeded and acted as karta until his death in October, 1900. Disputes then arose between Bakht Narain and Suraj Narain as to Bakht Narain's claim to be registered as karta and as to their rights and the rights of their respective sons in the joint family properties. Some arrangement and reconciliation of this family quarrel, though one neither firm nor durable, seems to have been effected, but disputes broke out again with regard to the property, and four suits were instituted on the 3rd of November, 1903, by Bakht Narain, and a fifth suit in 1905 by Suraj Narain who claimed a half share in the entire joint estate. These appeals are consolidated appeals in those suits, the question for determination being whether certain very numerous properties acquired since the death of Bakhshi Bishnu Narain are joint property. The appellants, who are certain members of the joint family, contend that they are. The respondent, who is the son-in-law of Ram Narain, says that they are not. The Subordinate Judge decided in favour of the present appellants. The Court of the Judicial Commissioner of Oudh reversed that decision. Hence these appeals.

Raj Narain had no son. Ram Narain also had no son, but had one daughter, to whom her father was much attached. She married Ratan Lal, the respondent, who contends that the disputed properties were either bought with his money or were

(1878) 12 B. L. R. 317 (329). (2) (1898) I. L. R., 17 Mad., 262.

given him by Ram Narain, and for those reasons are his own, or, at any rate, are not joint property.

The material facts that led up to this dispute are these :—

From about the year 1864 to the year 1880, or, perhaps later, Raj Narain practised as a pleader at Lucknow. In the year 1869 Ram Narain, who was then 23 years old, left Lucknow for Hardoi, and from that year onwards practised as a pleader at Hardoi. He was successful, and later in life became a rich man. Before 1890, while Raj Narain was karta, and after 1890, when Ram Narain was karta, properties were acquired at Hardoi. They were taken in various names—that of Raj Narain, that of Ram Narain, that of Ratan Lal, those of Ratan Lal and of his son Madan Mohan Lal and of other persons. The books of account of the family property were kept at Lucknow, where Raj Narain lived; but Ram Narain, who was at Hardoi, acted as manager of the properties at Hardoi as well before as after 1890. He bought properties at Hardoi, receiving, at any rate in one instance which is proved (that of the village Mahora), money from Lucknow to make the purchase, and he received income and made disbursements in respect of joint family property at Hardoi. But the purchases at Hardoi were made to a large extent not with joint family moneys, but with fees earned by Ram Narain in his practice as a pleader, and it is with these properties that these appeals are concerned. Under these circumstances their Lordships have taken as the first question to be answered in order to adjust the rights between the parties this question :—

Whether there is sufficient evidence to show that Ram Narain so blended his own property with the joint property as to make the whole joint property.

In the Hindu joint family the law is that, while it is possible that a member of the joint family should make separate acquisition, and keep moneys and property so acquired as his separate property, yet the question whether he has done so is to be judged from all the circumstances of the case. The latest authority is *Lal Bahadur v. Kanhaiya Lal* (1). The facts there were that in 1866 a partition of ancestral property had been

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effected between three brothers. The question arose in the case of one of the brothers who had thus taken his third share of the ancestral property. He had children. From the year 1852 onwards he had earned money as an official of the Indian Education Department, which he had paid into the same banking account as moneys admittedly joint. The question was whether these earnings were joint property. This Board held that they were. The dominant sentence in the judgement is as follows:—

“It is admitted that Durga Parshad and his sons lived together as a joint Hindu family, and it is established that there was a considerable nucleus of ancestral property in his hands after the partition. The *onus* was, therefore, on the respondent to prove that his subsequently acquired property was his separate estate.”

Their Lordships call attention to the fact that the person here spoken of as having ancestral property “in his hands” was the karta. Down to 1890 Ram Narain was not the karta. After that date he was. The decision, therefore, applies in strictness to the present case only from that date. Further, in that case the father was the karta and not, as in the present case, a brother. But in the facts to be presently stated their Lordships find that the decision has a very close application to the present case.

The position with regard to the private earnings of Ram Narain is this: It has not been established that any circumstances existed from which it could be inferred that there was any joint family estate in the separate earnings of the four brothers, and it must be accepted that the earnings of Ram Narain were moneys which he was at perfect liberty to use in any manner that he thought fit. At the same time, it would be quite consistent with the principle which regulates joint family estates that he should in fact have brought them into the joint property and made them part of the whole. The question is: Has he done so?

There is really little or no direct evidence upon the point except the books of account that he kept, supplemented by his own verbal evidence in a suit that was decided in 1893. But this evidence is important, and, in their Lordships' view, throws considerable light upon the true history of the case. The book of account that he kept, apart from the books of a cloth business

carried on at Hardoi and admittedly joint property, and separate registers and accounts of each of the villages, was a book which appears to have been in the same form and continued from 1869 down to the date of his death. It is not strictly an account book at all, but a book in which is recorded from day to day various payments and receipts of money from different sources, and undoubtedly it includes—and, so far as their Lordships are aware, it is the only book that includes—the receipts of his earnings as pleader and his private payments. For the year 1876 the book has been placed *in extenso* in the record. This year has been selected as a typical year, and their Lordships have accepted it as characteristic of the accounts throughout the whole material period of time. In addition to receipts from his professional income, it shows receipts from several properties which are admittedly joint properties, and, although the books and materials were open for the respondents' inspection, and these books included the register of the villages admittedly owned by the joint family in the Hardoi district, it has been impossible to show that these entries do not include receipts from all the joint properties that were then under Ram Narain's management. The entries also undoubtedly show certain payments of joint accounts, and in the case of the Mahora village they show the receipt of money from the joint family estate and its application in the purchase of this property. There are entries of revenue payments in respect of villages which were joint property; of income received from such villages; of fees received for professional work as pleader; of payments for the purchase of villages—e.g., the village of Samrehta, which was acquired in the name of Raj Narain, the karta, in July, 1876; the villages of Kasmundi and Backharwa, acquired in the name of Raj Narain in the same month; the village of Masit, acquired in December, 1876, in the name of Ram Narain; of payments made to servants at Lucknow on account of their pay, and so on. The account may be called an “omnibus” account, into which Ram Narain's professional fees are carried in common with other items such as described, and from these mingled sources a balance is struck day by day, and the whole account is abstracted and summarised at the end of the year. The receipts

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amount to Rs. 27,206-13-8, of which Rs. 2,866-4-9 are fees, Rs. 12 are presents, Rs. 1,578-3-6 are income from "personal villages on account of village Mahora" and from "joint villages"; Rs. 2,819-6-3 are "from the account of the personal and the leased villages," and so on. On the other side, are "purchases, Rs. 16,056-14-0," among which the villages of Masit, Samrehta, and Kasmundi are found. As the result, a credit balance of Rs. 189-1-6 at the beginning of the year becomes a credit balance of Rs. 141-11-1 at the end of the year.

Now there is nothing whatever to show that out of this account payments were from time to time transmitted to the joint family accounts that were kept at Lucknow, and this, in their Lordships' opinion, is a most material matter, because, if no such remittances were made, it follows that the balances that were carried forward from time to time and brought into account against future purchases were blended balances of Ram Narain's own earnings and of joint moneys and that they remain so blended throughout the whole period of time. It is quite true that, as time went on, other moneys were also entered in these accounts which cannot be regarded as joint. There were moneys received from Kishan Lal and Ratan Lal, from his daughter, and, it may even be, from other sources, and it is urged that these moneys cannot possibly be regarded as blended with the joint family estate, and that therefore Ram Narain's private earnings ought equally to be regarded as outside the joint property. But this argument is not conclusive, because these moneys, regarded as the moneys of Kishan Lal, Ratan Lal and his wife, were not the moneys of people sharing in the joint estate, and were incapable of being blended in the manner suggested and they would remain moneys for which Ram Narain would be liable to account; but his own means stood in a different position, and if their association with the joint family moneys in the account in the manner mentioned would be sufficient evidence of their being blended, the mere fact that other moneys were there also would not necessarily destroy the value of the inference.

The respondents had the means of showing before the Subordinate Judge that this system of account could be and was

explained, e g , that this was but an omnibus book and that he kept a separate joint property account. The respondents did not do so. The Subordinate Judge had all the books before him. Their Lordships have not. He concluded that the appellants were right. Their Lordships are not prepared to differ from him as to the effect of the books, all of which he saw and some of which their Lordships have seen. They have looked carefully to see what the Judicial Commissioners held on appeal as regards this part of the case. They express themselves as "perplexed" by the entries and found it "impossible to arrive at any certain conclusion as to the system on which these various account books were kept up." Their Lordships are not prepared to stop at the point of perplexity. They think that the books blend Ram Narain's professional earnings with his receipts and payments on account of joint properties, and thus afford evidence upon the question under consideration.

A second and most important head of evidence is found in a deposition made by Ram Narain on the 5th of August, 1893. This was three years after he became karta. He says :—

"The money was of our family, partly on account of savings from my practice and partly from remittances from Lucknow. The sale-deeds are in names of Raj Narain and some in my name too. I did not send any money in cash to Raj Narain from Hardoi. He never asked me to send."

And in cross-examination :—

"Money was not sent from Hardoi, as property was being purchased there. The proceeds of sale of ancestral villages and other ancestral money were used in villages in this district and also in other work of the family. No profit was [sic] ever took place in our family. My father had four sons, viz., Raj Narain, eldest, myself, Bakht Narain, and Suraj Narain. We were all joint and all family property was joint. Partition never took place. One member of the family works as manager. Raj Narain was manager and now I am manager. I, Bakht Narain, and Suraj Narain are still joint."

Their Lordships cannot find that the Judicial Commissioners gave any effect to this evidence. It is plain and directly to the point, and they have found no answer to it.

This conclusion, however, does not determine the case. Some of the properties that are in dispute are properties that were purchased in the name of the respondent, Ratan Lal, and it is still open to him to show that each of those transactions represented a gift from Ram Narain to himself. This question

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also is singularly destitute of direct evidence. There is an undoubted foundation from which such an intention could be readily assumed. Ram Narain was on terms of very close and intimate affection with his daughter. She was his sole child, and the formal phrase Nurchasmi, under which he constantly referred to her, conveyed more than a formal meaning. Ratan Lal, his son-in-law, also shared his affection, and seems to have made considerable sacrifices in return. He allowed his wife to stay in her father's house, and in the disputes which divided the family he took the side of Ram Narain against his own parents, and, it is said, was therefore disinherited. Ram Narain undoubtedly received from his son-in-law moneys for profitable investment, and the suggestion that these moneys might be regarded as returned by the payment of certain household expenses is one repugnant to the best ideas and traditions of a Hindu family, and one which their Lordships wholly reject. It is therefore easy to infer that Ram Narain had many motives which would prompt him to make abundant provision for his daughter and her husband, neither of whom would in the absence of such provision have any share in his estate.

But even with this presumption, the mere fact of purchases of properties in the name of Ratan Lal would not of itself be sufficient to show that they were intended as a gift, but their Lordships think that evidence is not wanting to make the inference complete, and that evidence is contained in the statement of Ram Narain himself. Their Lordships are in entire agreement with the Subordinate Judge and the learned Judicial Commissioners in holding that the statement of Ram Narain made in 1899 is properly admitted in evidence. It was a statement which, whether the property was joint or whether it was his own, it was against his own personal interest to make, since in effect it declared that the properties there referred to were those of Ratan Lal; nor do their Lordships see any reason why it should be discredited; and if accepted, it furnishes sufficient evidence, taken in connection with the circumstances, to support the claim of Ratan Lal. It is in these terms:—

"The capital outlay required, to pay the arrears of revenue was provided partly by me and partly by Ratan Lal. The profits will be enjoyed entirely

by him. I manage this estate for him and also his other *zamindari* in this district I have bought a lot of *zamindari* in his name, in order to make provision for him, as against my adopted son, who would be my heir."

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Their Lordships do not think that this evidence and that given in 1893 are irreconcilable. The former related to a period different from the latter, and it does not follow that they cover the same transactions. Upon the view which their Lordships have already expressed, Ram Narain did blend his own moneys with the joint family moneys, and purchased property in his own name and that of Raj Narain which must be regarded as joint estate; but this does not necessarily lead to the conclusion that the properties purchased in the name of Ratan Lal were of the same character. It is admitted that there were abundant moneys coming from the private earnings of Ram Narain to furnish the consideration for these purchases and that he was at full liberty to use them for that purpose if he so desired. But if once the intention to buy them for Ratan Lal be accepted, as their Lordships think it must, there only remains the question as to whether these moneys had been so dealt with by Ram Narain before his purchase as to put it outside his power to gratify the intention of making the gift. The material before their Lordships does not lead them to this conclusion. Remembering that Ram Narain had full power to deal with his earnings as he thought fit, the fact that he blended those that were not otherwise used does not mean that every entry of a purchase in the book is an entry of a transaction so dealt with that it must be regarded as joint property. If, for example, having moneys of Ratan Lal's in his own hands, he either by using his own moneys or by borrowing on his own account obtained the funds necessary for the purchase of the property in question, and such properties were bought with the intention of benefiting Ratan Lal, the mere fact that the transactions were recorded in the books which also recorded the receipts of his own and the joint moneys would not prevent them being used for that purpose, and this view appears to have been taken by the Subordinate Judge; but if this be so, it appears to their Lordships to apply equally to purchases made with Ram Narain's moneys alone, when once it is accepted that they were used with the intention of making a gift. The learned Judicial Commissioners appear

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to think that, even assuming that they had been blended in the first instance, there was nothing to prevent Ram Narain from making this use of them, and there would appear to be some support for this view in the fact that similar joint moneys were apparently used for the endowment of the daughter of Ikbāl Narain.

Their Lordships do not, however, think it is necessary to rely on this circumstance. For reasons already given, they think that the gift in favour of Ratan Lal may be regarded as established so far, but so far only, as the properties are concerned in the Hardoi district, which were bought in the name of Ratan Lal alone.

There only remains one further point for consideration, and that affects certain properties, Nos 1—4 inclusive and No 32 in List 5, which were purchased at auction at a sale under order of the Court in the name of Ratan Lal. Their Lordships were satisfied that any claim to these properties by the appellants is defeated by section 317 of the Civil Procedure Code.

Their Lordships will therefore humbly advise His Majesty (1) that these appeals ought to be allowed in part, (2) that the decrees of the Court of the Judicial Commissioner of Oudh respectively dated the 30th day of October, 1909, and the decrees of the Court of the Additional Judge of Hardoi respectively dated the 27th day of August, 1908, as regards the following properties which have not been in question upon these appeals ought to be affirmed: List V annexed to plaint in Suit I of 1908, Item 23, Mauza Gobardhanpur, 2 biswas; List VIA annexed to plaint in Suit I of 1908, Item 1, houses and shops in Hardoi Khas; List VIII annexed to plaint in Suit I of 1908, Item 42, decree in suit of Pandit Ratan Lal v. Sripal Singh, and the business carried on in the cloth shop at Hardoi; (3) that it ought to be declared that the appellants are also entitled to the following properties; List V annexed to plaint in Suit I of 1908, Item 30, Kashmiri Bagh Sillaji, Item 31, half share of the land at Pakra; List VIA annexed to plaint in Suit I of 1908, Item 19, land at Suklapur, Item 20, land at Thok Khala, Item 21, land at Thok Uncha; List VIII, annexed to plaint in Suit I of 1908, Item 34, decree against Pandit Ram Narain, Item 35, agreement

for costs; (4) that the appellants' claim to the remaining proper ties ought to be dismissed; (5) that in other respects, except as to costs, the decrees of the Court of the Judicial Commissioner ought to be set aside; (6) that subject to the aforesaid declarations and modifications the decrees of the Court of the Additional Judge ought to be restored; and (7) that the parties ought to bear their own costs of these appeals.

Appeals partly allowed and partly dismissed.

Solicitors for the appellants:—*James Gray and Son.*

Solicitors for the respondents:—*T. L. Wilson and Co.*

J. V. W.

ANANT RAM AND OTHERS (PLAINIFFS) v. COLLECTOR OF ETAH AND
OTHERS (DEFENDANTS.)

[On appeal from the High Court of Judicature at Allahabad.]

Hindu Law—Mortgage by manager of joint family who was not father of the other members—Burden of proof of legal necessity for mortgage—Where no necessity proved the interest of such manager not saleable in enforcement of mortgage—Mortgage only operative to the extent to which the mortgage money was proved to be necessary

The mortgage of joint estate made by the manager of a joint family who is not the father of the other members of the family can only be justified so far as it is wanted for the joint family purposes. If the necessity cannot be established by direct evidence, it may be assumed if it can be shown that reasonable care was taken to ascertain if such circumstances existed, and the transferee acted in good faith [section 98 of the Transfer of Property Act (IV of 1882)] In either case the burden of proof lies on the person who claims the benefit of the mortgage. *Bhanya Chandra Dhar Biswas v Jagat Kishore Acharya Chowdhuri* (1) followed.

There was no difference between the burden of proof when it is desired to support a mortgage made by a manager of a joint estate, and that which is required to support the mortgage made by a widow who has only a similar limited power of disposition.

If the debt was not incurred for family necessity, the interest of the manager of the family with respect to mortgages in the same province as that from which the present case has been brought, cannot be sold in enforcement of the mortgage. *Lachman Prasad v. Sarnam Singh* (2) referred to.

In the present case the mortgagee had only discharged the burden thrown upon him of proving necessity for the deed to the limited extent as held by the High Court, and the security, therefore, stood only to the limited extent proved.

**Present.*—Lord BUCKMASTER, Sir JOHN EDGE, Sir WALTER PHILLIMORE, BART., and Sir LAWRENCE JENKINS.

(1) (1916) I. L. R., 44 Cal., 183; I. R., 43 I. A., 249.

(2) (1917) I. L. R., 39 All., 500; I. R., 44 I. A., 163.

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APPEAL 37 of 1916 from a judgement and decree (11th of May, 1911), of the High Court at Allahabad, which varied a decree (31st of May, 1909), of the Subordinate Judge of Aligarh.

This appeal arose out of a suit brought by the respondents to enforce a mortgage, dated the 4th of September, 1894, made by Sheoraj Singh as manager of a Hindu joint family consisting of himself and his brother Maharaj Singh, and governed by the Mitakshara law. By the mortgage deed it was stated that Sheoraj had borrowed Rs. 3,000 in order to pay the Government revenue in respect of the villages held by the joint family, and that he promised to pay that sum on demand with interest at the rate of Rs. 1-2 per cent per mensem. There was also a provision for the payment of compound interest at the same rate with half-yearly rests on default in payment of the simple interest. The mortgagor hypothecated some of the joint family property (shares in villages held by the joint family) besides other property as security for the payment of the mortgage money. In February, 1907, some of the shares in the mortgaged villages were put up for sale in execution of a money decree and were purchased by Raja Balwant Singh of Awa now represented by the Collector of Etah who was in charge of his estate.

The defence of Sheoraj Singh was that "at the time of the execution of the deed he had a pressing necessity to borrow money for the purpose of paying revenue owing to the pressing demand and through fear of the attachment of the property he executed the deed sued on without thinking over the matter;" and that the mortgagee taking advantage of his necessity got an exorbitant rate of interest put into the deed "thereby exercising undue pressure."

The main defence of the other defendants (Maharaj Singh and others) was that as Sheoraj alone had executed the mortgage it could not be enforced against Maharaj Singh, and that there was no necessity for contracting the debt from which Maharaj had derived no benefit.

The Subordinate Judge found that the mortgage was enforceable against the property of Sheoraj Singh and his brother, being joint property, and passed a decree for sale of the mortgaged

property, and for recovery of the whole sum claimed except a small amount of interest which he disallowed.

On appeal the High Court (KARAMAT HUSAIN and E. M. D. CHAMIER, JJ) varied the decree of the Subordinate Judge. The material part of their judgement was as follows :—

“Sheoraj Singh was, it may be assumed, manager of the property of the family, to which he belonged, and the mortgage is therefore enforceable against the family, to which he belonged, and the mortgage is therefore enforceable against the family property so far as it is supported by actual necessity or, at all events, a reasonably credited necessity. The issue on this point fixed by the Subordinate Judge is rather curiously worded. It runs as follows :—‘Whether Rao Maharaj Singh benefited by the money lent and is liable to pay it?’ Notwithstanding the language of the issue, it is clear that both parties understood what they had to prove, and that the plaintiffs set themselves to prove that the loan was contracted for necessity. The evidence shows that of the sum advanced by Harkishan Das, Rs. 918-13-9 were paid into Kasganj tahsil on the day on which the mortgage was registered on account of land revenue due on two villages belonging to the family of the mortgagor. It is also shown that on the same day Rs. 779-7-10 were paid into the same tahsil on account of irrigation charges in respect of two villages of the family and the revenue of a third village. Beyond these two sums, there is no evidence of any necessity, nor is there any evidence that Harkishan Das made inquiries which led him to believe that there was any necessity. The mortgage is, therefore, enforceable only to the extent of Rs. 1,698-5-7. The question might have arisen as to whether the whole mortgage was not enforceable against the share of the mortgagor at all events. But according to the Full Bench decision in *Chandra-deo Singh v. Mata Prasad* (1) as interpreted in *Kali Shankar v. Nawab Singh* (2) the mortgage is not enforceable even as against the mortgagor's share except in so far as it is supported by necessity. The Subordinate Judge, as already stated, has disallowed a portion of the interest. He says that it is uncommon to provide for compound interest with six-monthly rests. We cannot agree with him. Compound interest with six-monthly rests is not uncommon, nor is it necessarily penal, and inasmuch as it cannot be said that the mortgagor was in this matter overreached in any way, we see no reason why the payment of interest should not be enforced according to the contract.

“The result is that we are of opinion that the decree of the court below should be modified. In modification of that decree, we pass a decree in favour of the plaintiffs respondents for Rs. 1,698-5-7 with interest at the rate specified in the mortgage up to the date fixed for payment in the decree of the court below, and thereafter at the rate of 6 per cent per annum.”

On this appeal, which was heard *ex parte*, B. Dube for the appellants contended that the evidence showed that the money was lent to the mortgagor on the faith of the representation made by him to the mortgagee that it was urgently

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(1) (1909) I L R., 31 All., 176 (2) (1909) I. L. R., 31 All., 507.

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needed for family necessity. It was also proved that the mortgage debt was incurred for legal necessity. The recitals in the deed and the actual payments of the revenue made raised a presumption that the whole of the money was borrowed for necessity. The absence of legal necessity was not raised in the pleadings by the defendant Raja Balwant Singh, and should not have been made a ground of decision by the High Court. Reference was made to *Banga Chundra Dhur Biswas v. Jagat Kishore Acharya Chowdhuri* (1), *Sahu Ram Chandra v. Bhup Singh* (2) and *Luchman Prasad v. Sarnam Singh* (3), but the recent cases, it was admitted, were opposed to the appellant's contention.

The judgement of their Lordships was delivered by Lord BUCKMASTER:—

The question raised in this appeal is as to the rights of certain mortgagees under and in respect of a mortgage which was dated the 4th of September, 1894. That mortgage was executed by one Raja Sheoraj Singh, the manager of certain joint property held by himself and his brother, Maharaj Singh, and governed by the Mitakshara law. The mortgage was for the sum of 3,000 rupees, with interest at the rate of 1 rupee 2 annas per cent per month, with compound interest and half-yearly rests. The mortgage affects three villages, and on the face of it there is a recital that the money was lent in order that the mortgagor might pay the Government revenue. The original mortgagee is dead, and his representatives instituted the proceedings out of which this appeal has arisen for the purpose of enforcing their rights under the mortgage deed. A considerable number of defences were raised by the different parties who were made defendants to those proceedings, but for the purpose of the present appeal only one of those defences needs consideration. That defence is this: that the property that was mortgaged being joint property, a mortgage could only be operative to the extent to which the mortgage money was needed for the necessities of the joint estate. The learned Judge before whom the case was heard allowed the whole of the original mortgage debt to stand,

(1) (1916) I. L. R., 44 Cal., 183; L. R., 43 I. A., 249.

(2) (1917) I. L. R., 39 All., 437; L. R., 44 I. A., 126.

(3) (1917) I. L. R., 39 All., 500; L. R., 44 I. A., 163.

but reduced the rate of interest. The High Court, to whom an appeal was brought, has allowed the mortgage for part only of the original sum, namely, for the sum of 1,698 rupees, 5 annas, and has restored the full rights of interest which the mortgagee possessed under the deed on that sum.

The appeal from that judgement has been brought under an order made by the High Court, who thought that the appeal gave rise to two questions of importance, the first being: "Whether the burden lies upon a mortgagee who takes a mortgage from the manager of a joint Hindu family governed by the Mitakshara law to prove that the debt was incurred for family necessity"; and the second. "Whether, if the debt was not so incurred, the interest of the manager of the family, that is, of the mortgagor, in the mortgaged property could be sold in enforcement of the mortgage." It is to be observed that the grounds upon which the appeal was permitted do not include the question of considering whether, in point of fact, more than the amount allowed by the High Court had in fact been raised by way of necessity; but this point has been argued and considered by their Lordships.

As to the first of these two questions their Lordships entertain no doubt. The mortgage of joint estate made by the manager of the property, who is not the father of the other members of the joint family, can only be justified so far as it is wanted for the joint family purposes. If the necessity cannot be established by direct evidence it may be assumed, if it can be shown that reasonable care was taken to ascertain if such circumstances existed and the transferee acted in good faith (sec. 38, Transfer of Property Act). In either case the burden of proof lies on the person who claims the benefit of the mortgage. There is no difference between the burden of proof when it is desired to support a mortgage made by a manager of a joint estate and that which is required to support the mortgage made, for example, by a widow who has only a similar limited power of disposition. In the case of *Banga Chandra Dhur Biswas v. Jagat Kishore Acharjya Chowdhuri* (1), following previous decisions to the same effect, it was stated in perfectly clear and unambiguous terms that the burden of proving that such dispositions were

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(1) (1916) I. L. R., 44 Cal., 186; L. R., 48 I. A., 240.

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lawful rests upon the persons who seek to claim benefits under them. The question, therefore, which the High Court thought needed consideration, so far as the burden of proof is concerned, must be decided against the appellants.

As to the second point, that question, so far as it covers mortgages in the same province as the province from which this appeal has been brought, has also been decided since the judgment of the High Court, adversely to the appellants' contention in a case to which their Lordships' attention was called—*Lachman Prasad v. Sarnam Singh* (1).

There remains only the point as to whether in this case the High Court were right in thinking that the mortgagee had only discharged the burden thrown upon him of proving necessity for the deed to the limited extent of the 1,698 rupees. Now the facts with regard to that matter are these:—There were three villages that were the subject of the mortgage. The statement in the deed was that the money was needed to pay the Government revenue. What payments were made in respect of that revenue could easily be established by calling the proper witnesses, and, indeed, one such witness was called for the purpose of proving payments in respect of two of the villages, and he showed payments to the amount for which the High Court has allowed the mortgage to stand. The mortgagee cannot allege that the witnesses who could prove the necessity, on the existence of which his security depends, are inaccessible, or cannot now be obtained through lapse of time or for other good reason. The proof could have been and ought to have been laid before the Court by the appellants, on whom the burden rests. That burden they have failed to discharge, and in their Lordships' opinion the High Court was perfectly right in deciding that the security stood to the limited extent only of the necessity proved. They will therefore humbly advise His Majesty that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants : *Barrow, Rogers, & Nevill.*

J. V. W.

(1), (1917) I. L. R., 39 All., 500; L. R., 44 I. A., 163.

APPELLATE CIVIL.

*Before Sir Henry Richards, Knight, Chief Justice, and Mr Justice
Muhammad Rafiq.*

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May, 25

DEO NARAIN SINGH AND OTHERS (DEFENDANTS) v SITLA BAKHSH
SINGH AND OTHERS (PLAINTIFFS).*

*Act (Local) No II of 1901 (Ag a Tenancy Act), sections 95, 177 (f)—Civil
and Revenue Courts—Jurisdiction—Appeal.*

A party to a suit in a Revenue Court cannot, merely by formally raising an absolutely untenable plea of jurisdiction, remove the case from the Revenue Court to a Civil Court.

IN this case a suit was brought in a Civil Court to eject the present plaintiffs as trespassers. They thereupon raised the plea that they were not trespassers, but tenants of the then plaintiffs. On this the Civil Court directed them to file a suit in the Revenue Court to have their status as tenants declared. The present suit was accordingly instituted under section 95 of the Agra Tenancy Act. An objection was taken to the jurisdiction of the Revenue Court, but it was overruled, and the Revenue Court proceeded to hear the case and pass a decree. An appeal was preferred to the District Judge and cross-objections were filed by the other side. The District Judge entertained the appeal upon the ground that a question of jurisdiction had been decided, and passed a decree. From this decree the defendants appealed to the High Court, and the plaintiffs filed cross-objections.

Munshi *Haribans Sahai*, for the appellants.

Mr. *A. P. Dube*, for the respondents.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This appeal arises under the following^a circumstances. The present defendants brought a suit in the Civil Court for possession against the plaintiffs as trespassers. The latter pleaded that they held the land as tenants to the plaintiffs. The Civil Court thereupon made an order directing the defendants in that suit to institute within three months a suit in the Revenue Court for determination of the question. This order was made under the provisions of section 202 of the Tenancy Act. This suit was thereupon

* Second Appeal No. 429 of 1915, from a decree of B. J. Dalal, District Judge of Benares, dated the 14th of November, 1914, modifying a decree of Bhagwati Dayal Singh, Assistant Collector, First Class, of Jaunpur, dated the 17th of July, 1914.

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*

instituted asking for a declaration of the nature of the tenancy under section 95 of the Tenancy Act. An objection was taken as to his jurisdiction to hear the suit, which he at once overruled. He then dealt with the suit and made a decree. An appeal was preferred to the District Judge and cross-objections filed by the other side. The learned District Judge entertained the appeal on the ground that a question of jurisdiction had been decided. He then dealt with the case on the merits. An appeal has been preferred by the defendants and the plaintiffs have filed cross-objections. In our opinion no question of jurisdiction was in reality decided by the Assistant Collector. In the first place the suit was brought in compliance with the order of the Civil Court that a suit should be instituted in the Revenue Court. In the next place the suit was under section 95 of the Tenancy Act, which Act expressly provides that suits under section 95 must be brought in the Revenue Court and no other. It was, therefore, absolutely absurd to contend that the Revenue Court had no jurisdiction to hear the present suit. It would be reducing matters to an absolute absurdity to hold that the defendants in a revenue suit could by formally raising an absolutely untenable plea of jurisdiction, take every case from the Revenue Court to the Civil Court. We accordingly allow the appeal to this extent that we set aside the decree of the learned District Judge and remand the case to him with directions to return the memorandum of appeal and the cross-objections for presentation to the proper court. Costs here and heretofore will be costs in the cause.

Appeal allowed and cause remanded.

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November, 5.

Before Mr. Justice Piggott and Mr. Justice Walsh.

RADHE LAL (DEFENDANT) v BHAWANI RAM (PLAINTIFF) AND
MUSAMMAT BIDYA (DEFENDANT).*

*Hindu law—Succession—Hindu widow—Unchastity in husband's
life-time—Condonation by husband*

Under the Hindu law, a widow is not debarred from inheriting to her husband on the ground that she had become unchaste in her husband's

* Second Appeal No. 147 of 1916, from a decree of B. C. Forbes, Subordinate Judge of Muttra, dated the 15th of December, 1915, reversing a decree of Gauri Prasad, Munsif of Mahaban, dated the 18th of December,

life-time, if the husband had condoned her unchastity. *Gangadhar Pa appa Alur v. Yellu kom Vraswami Shrivale* (1) followed *Matunginee Dabee v. Joykallee Dabee* (2) and *Moni am Kohla v. Keri Kohlani* (3) referred to

BALMAKUND and Bhawani Ram, by caste Brahmins, were brothers, separate in estate. Balmakund died without issue in 1911. His widow Musammat Bidya took possession of his property. In 1912 she sold a house which formed part of that property to Lala Radhe Lal. Bhawani Ram brought a suit against the widow and the vendee for possession of the house on the ground that Musammat Bidya was unchaste during the life-time of her husband and, accordingly, not entitled under the Hindu law to inherit. An alternative relief was claimed for a declaration that the sale would not be binding on the plaintiff after the widow's death. The court of first instance found that about 1904 Musammat Bidya had run away from her husband's house with one Babu Lal and had illicit connection with him; that subsequently her husband condoned the offence and freely took her back in his house where she lived with him as his wife upto the time of his death; and that she was neither outcasted nor treated as such. It was admitted, however, that since her husband's death she had taken up an immoral life with Radhey Lal and had an illegitimate child by him. It was not found whether or not she had performed any expiatory ceremonies for the act of unchastity committed in 1904. The court held that the unchastity having been condoned by the husband she was entitled under the Hindu law to inherit her husband's property. As to the sale consideration the court found that a part of it was for legal necessity, and gave the plaintiff a declaratory decree in accordance with that finding. Both parties appealed, and the lower appellate court, while upholding all the findings of the court of first instance, was of opinion that unchastity during her husband's life-time debarred Musammat Bidya from inheriting the property and that the subsequent condonation by the husband was of no avail in removing the bar. The lower appellate court accordingly gave the plaintiff a decree for possession. The defendant Radhe Lal appealed to the High Court.

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(1) (1911) I. L. R., 36 Bom., 133. (2) (1869) 14 W. R., A. O. J., 23.

(3) (1880) I. L. R., 5 C. L., 773.

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The Hon'ble Munshi Narayan Prasad Ashthana, for the appellant :—

The authoritative writings of Hindu law-givers which make any mention of chastity in connection with the widow's right to inherit are founded on the two following texts, quoted in *Mitakshara*.—Colebrooke's Translation; Ch. II, section 1, § 6: "The widow of a childless man, keeping unsullied her husband's bed and persevering in religious observances, shall present his funeral oblation and obtain his entire share (Vridha Manu)," and "Let the widow succeed to her husband's wealth provided she be chaste (Katyayana)." Although in the chapter dealing with the subject of exclusion from inheritance the *Mitakshara* does not enumerate unchastity by itself, i. e., apart from loss of caste that may result from it, as one of the grounds of exclusion, the courts have ascribed a binding character to these two texts and have accepted them as laying down that a widow who has been leading an unchaste life at the time of her husband's death is disqualified from succeeding to her husband's property. The texts are applicable only with reference to the time when the succession opens out on the death of the husband; so that, a widow who had inherited her husband's property would not be liable to forfeit it by reason of subsequent acts of unchastity; *Moniram Kolita v. Keri Kolitani* (1). Further, it has been held that a woman who at the time of her husband's death has been living a chaste life is not disqualified from inheriting by reason of her having committed at some former time an act of adultery, if that act has subsequently been condoned by her husband; *Gangadhar Parappa Alur v. Yellu kom Viraswami Shiravale* (2) and *Matunginee Dabee v. Joykallee Dabee* (3). In the last mentioned case MARKBY, J., dealt exhaustively with the various texts and authorities relevant to the subject. According to Hindu texts unchastity is of different grades. Mere adultery is less heinous and is expiable; but, if followed by conception or child-birth or by loss of caste, it is regarded as of an aggravated type and as being inexpiable. No doubt the case might be different if the adultery in question

(1). (1880) I. L. R., 5 Cal., 776. (2) (1911) I. L. R., 86 Bom., 138.

(3) (1869) 14 W. R., A. O. J., 23.

were of the latter type. Here, the woman was not only not degraded or outcasted, but restored by the husband to the full status of a wife. Different questions might have arisen if the husband had altogether repudiated or abandoned her. The subject is discussed in *Sirvya : Hindu Woman's Estate*: 1913 Edn., pp. 37 to 39.

Dr. *Surendro Nath Sen*, for the respondents:—

The texts cited by the appellant, as well as other texts, for example, that of Vrihaspati, to be found in *Sacred Books of the East*, Vol. 33, Ch. XXV, sec. 49, p. 377, and that of Prajapati, quoted in *Viramitrodaya*: Translated by Sastri: 1879 Edn., p. 133, emphatically make chastity a condition precedent to the widow's succeeding to her husband's property. And there is nothing in the texts to confine the inquiry as to her chastity to the time of her husband's death; on the other hand, the texts contemplate the whole of her married life. This is in accordance with the conception of marriage in Hindu Law, and with the reasons for the widow's inheritance. According to the Hindu Shastras marriage is not a civil contract but a religious institution or sacrament; it is a holy union for the performance of religious duties; *Golap Sastri*: Hindu Law: 4th Edn., pp. 85, 88. And one reason for the succession of the widow to her husband's property is her competence to perform the religious rites in honour of him and his ancestors. The estate of the husband may be taken only by a wife who is chaste and who is competent to perform religious ceremonies conducive to the spiritual benefit of her husband; *Viramitrodaya*: Translated by Sastri: 1879 Edn., p. 133. Unchastity which has not been expiated by the performance of purifying ceremonies renders the widow incompetent to perform religious rites for the spiritual welfare of her husband. The wife's right to be her husband's heir is founded on her fidelity and loyalty to him. It is her devotion to the husband that constitutes her to be the half of her husband, in which capacity it is that she inherits; *Golap Sastri*: Hindu Law: 4th Edn., p. 365. Further, it is observed at page 367 of the same book that mere unchastity, when not followed by conception or loss of caste, is expiable and cannot justify exclusion from inheritance, except in the case of the wife, whose case stands on

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a different footing altogether from that of other female relations, for, conjugal fidelity forms the foundation and is the *sine qua non* of her right of inheritance. The case of *Moniram Kolita v. Keri Kolitani* (1) relied on by the appellants has no bearing on the present case; the question for determination there was not whether unchastity committed during the husband's life-time debarred the widow from inheriting, but whether unchastity committed after the husband's death divested her of the estate that had already vested in her. The case of *Gangadhar Parappa Alur v. Yellu kom Viraswami Shirawale* (2) is distinguishable, there, seemingly, the adultery was committed at the husband's express desire and the person who was setting up the unchastity of the widow was a stranger. As to the effect of condonation by the husband, the appellant has not cited any texts of Hindu law-givers in support of the proposition that such condonation makes an unchaste wife entitled to inherit. The texts which have been cited make no such reservation in favour of an unchaste wife. From what has been submitted above it follows that condonation can make no difference to her position regarding inheritance; for it cannot make her chaste who has been unchaste. The husband may forgive her and treat her kindly and suffer her to live with him; but his condonation cannot remove her spiritual degradation and incompetence for religious rites. It is not a substitute for expiation. The stain of unchastity cannot be removed either by the husband's previous consent or by his subsequent condonation. Where the marriage is essentially a matter of contract it rests with the husband either to divorce an erring wife and deprive her of all rights or to condone the offence and to continue or reinstate her in all her rights. As has been already submitted a Hindu marriage is different. The husband cannot divorce an unchaste wife and reduce her to absolute destitution, nor can he by condonation restore her to her full status.

The Hon'ble Munshi *Narayan Prasad Ashtana*, was not heard in reply.

PIGGOTT and WALSH, JJ.:—This is a second appeal arising out of the following state of facts. One Balmakund died as a

(1) (1869) 14 W. R., A. O. J., 23. (2) (1911) I. L. R., 36 Bom., 138.

separated Hindu; he was childless and left him surviving a widow, Musammat Bidya. The latter performed the obsequies of her deceased husband and entered into possession of his property, including a certain house. She subsequently sold this house to one Radhe Lal. Thereupon the pre-ent suit was brought by Bhawani Ram, brother of Balmakund, impleading Musammat Bidya and Radhe Lal as defendants. Relief was sought in the alternative, either by immediate possession over the house in question, or by way of a declaration that the alienation made would not bind the plaintiff after the death of Musammat Bidya. The reason why the first relief was claimed was that the plaintiff alleged that Musammat Bidya, having been unchaste during the life-time of her husband, was not his heir at all under the Hindu law and was disentitled to succeed to any of his property, even with the limited estate of a Hindu widow. With regard to this allegation of unchastity we have concurrent findings by the courts below, and these findings are binding upon us in second appeal. Musammat Bidya was in fact guilty of unchastity during the life-time of her husband. She left her home with a paramour some eight years before her husband's death; but her husband condoned the offence, forgave his erring wife and took her back into his house, where she lived with him as his wife during the closing years of his life and was so living at the time of his death. A point has been made in argument before us that there is no evidence of the performance on the part of Musammat Bidya of any of the expiatory ceremonies prescribed by Hindu law. It is true that the record is silent on this point, but on the other hand, there is no allegation that Musammat Bidya was outcasted in consequence of her conduct, or that any social penalty was inflicted on Balmakund by the members of his brotherhood on account of his having readmitted the erring woman to the privileges of wife-hood. On these facts the court of first instance held that Musammat Bidya had succeeded to the estate of Balmakund with the rights of a Hindu widow. The learned Munsif went into the question of consideration for the sale-deed in suit. The total consideration was Rs. 500, and the finding is that out of this Rs. 200 was spent on the due performance of ceremonies and observances in connection with the

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funeral rites of the deceased. To this extent therefore the alienation was justified by necessity. The learned Munsif accordingly gave the plaintiff a declaration to the effect that the sale in favour of Radhe Lal was not binding upon him after the death of the widow, except to the extent of a sum of Rs. 200. There were appeals by both parties, and that is the reason why we have two appeals now before us, although in this Court both of them are preferred by the defendant, Radhe Lal. The learned Subordinate Judge has not dissented from the court of first instance on any finding of fact, but he had taken a different view of the law applicable to those facts. He holds that the proved unchastity of Musammatt Bidya disentitled her to inherit the estate of her deceased husband, and that this disqualification is in no way affected by the husband's condonation or forgiveness. In the appeals now before us Radhe Lal only asks for the restoration of the decree passed by the court of first instance, and we have nothing to consider except the question of law on which the two courts below have differed. There is no clear authority of this Court on the point, but there is a reported decision of the Bombay High Court which seems to go the whole length in favour of the appellant. This is the case of *Gangadhar Parappa Alur v. Yellu kom Viraswami Shirawale* (1). It has been contended before us on behalf of the respondents that the facts of this case are distinguishable from those now before us, and a similar contention evidently found favour in the lower appellate court. The suggestion is that the two cases are to be distinguished on two grounds, first, because in the Bombay case the allegation of the plaintiff was that the unchastity there alleged had been committed during the husband's life-time at his express desire; secondly, that the alienation in the present case is being contested, not by a stranger, but by a brother of the deceased. There is something to be said in support of both these contentions, the report of the Bombay case being very brief and not making it clear beyond dispute what was the precise state of facts on which the court proceeded. It seems clear, however, that the argument of the learned Judges, in which reference is made to a charge of unchastity brought

(1) (1911) L. L. R., 36 Bom., 188

forward by mere outsiders, cannot be regarded as affecting the decision in the sense contended for on behalf of the plaintiff respondent in the present case. In the first place it is by no means clear that the expression 'mere outsiders' as used in the judgement of BEAMAN, J, means anything more than persons other than the husband or the wife. Apart from this, the learned Judge evidently conceived himself to be laying down a general principle of law which, unless affirmed, would leave it open to any person interested in the matter to deny on some future occasion the rights of a widow who had peacefully succeeded to the possession of her late husband's property, by raking up some ancient scandal long antecedent to the date on which the inheritance opened.

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As regards the general question of condonation by the husband, it seems clear that the Bombay decision does not mean to lay down any distinction between an act of adultery committed with the previous knowledge and consent of the husband and a similar act committed behind his back, but covered by his condonation and forgiveness. Nor does it seem possible to lay down any valid distinction upon these lines. There is one other reported authority on the point which deserves careful consideration, namely *Matunginee Dabee v. Joykallee Dabee* (1). The actual point for decision in that case was the much controverted question, set at rest later on by the decision of their Lordships of the Privy Council in *Moniram Kolita v. Keri Kolitani* (2), as to the consequences of unchastity on the part of a Hindu widow after the estate had opened in her favour. The learned Judge, however, found it necessary to enter into an elaborate examination of the entire question, and the result is that we find propositions of law laid down which have a direct bearing on the question now before us. Mr. Justice MARKBY quotes an older case of the same Court as authority for the proposition that even adultery in the husband's life time is not in itself necessarily sufficient to disentitle the wife to inherit. He goes on to explain his meaning by saying that, in his opinion, it is not the immoral act alone which in any case destroys the right, but the loss of caste or degradation which may follow thereupon. A more

(1) (1869) 14 W. R., A. O. J., 23. (2) (1880) I. L. R., 5 Cal., 776.

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important passage of the same judgement is to be found at page 29 of the report, where the learned Judge quotes with approval the opinion of Babu Shama Charan Sircar, to the effect that, "the woman who is adulterous at the time when the succession opened, or who previously committed adultery which remained unexpiated by penance, forfeits her right to inheritance and maintenance, and not she who was previously adulterous, but ceased to be so and co-habited with her husband or expiated, or was about to expiate, the sin by penance before the time of succession." The decision of Mr. Justice MARKBY was appealed against and we have in the same report the decision of a Bench of two Judges who decided that appeal. PEACOCK, C. J., again referred to the words already quoted from Babu Shama Charan Sircar's work, and quoted them with approval as embodying a correct statement of law on the point. These opinions seem sufficiently to cover the state of facts now before us. It may be noted further that in the Privy Council case to which reference has already been made the learned Judges reproduced, with an expression of their approval, a portion of the decision of Sir BARNES PEACOCK above referred to. In the portion so quoted stress is laid upon the practical inconvenience which might result if it were held that any act of unchastity on the part of the widow, committed after the succession had opened in her favour, were to be treated as divesting her of the estate. It is obvious that a similar argument from convenience may be relied on in support of the appeal now before us; for a decision against the appellant would involve this consequence, that a Hindu widow who had been living in peace and harmony with her husband at the time of his death, and had obtained possession of his estate, might find her possession called in question years afterwards, on the evidence, it may be, of a spiteful or dishonest servant, on the strength of acts alleged to have been committed by her many years prior to her husband's death. Their Lordships approved of the remark that, although inconvenience would not be a ground for deciding a case like the present if the law were clear upon the subject, it is an argument which may fairly be adduced under certain circumstances. The arguments based upon ancient texts which have been relied upon on behalf of the respondent in the present case

are in substance the same arguments which were considered by their Lordships of the Privy Council, and rejected as unsatisfactory, when the question before them was whether a Hindu widow could be divested of the estate of her late husband by reason of acts of unchastity committed during her widow-hood. On the authorities, therefore, and on general grounds of public policy and convenience, we think that this appeal ought to be allowed. We set aside both the decrees of the lower appellate court and restore the decree passed by the court of first instance. The order of that court as to costs will stand, but the defendant Radhe Lal will get his costs on the appeal filed by Bhawani Ram in the lower appellate court and also his costs in this Court. On the other hand Radhe Lal will remain liable for his costs in the appeal filed by him in the lower appellate court.

Appeal allowed.

Before M. Justice Piggott and Mr. Justice Walsh.

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Act No. IV of 1882 (Transfer of Property Act), sections 54, 48—Mutual sales of property effected by registered deeds—Subsequent agreement to exchange portions of property sold—Agreement acted upon, but without execution of written instrument—Legal position of parties

In 1905, A by means of a duly registered deed, sold property X, with other property, to B, and B similarly sold property Y, with other property, to A. Possession of items X and Y was, however, not transferred, and shortly afterwards A and B agreed to exchange the two properties. No deed of exchange was ever executed, but the parties remained in possession of the properties in question from 1905 onwards. In 1915 some of the heirs of B sued to recover property X from A in virtue of the sale deed of 1905. *Held* that in the circumstances the plaintiffs were not entitled to recover. *Kurri Veerareddi v. Kurri Bapireddi* (1) and *Chidambara Chettiar v. Vaidilinga Padayachi* (2) dissented from *Mahomed Musa v. Aghor Kumar Ganguli* (3), *Elizabeth Maddison v. John Alderson* (4) *Sumsuddin Goolam Husein v. Abdul Husein Kalimuddin* (5), *Karalia Nanubhai Mahomedbhai v. Mansukham Valchatchand* (6),

* Second Appeal No. 442 of 1916, from a decree of Durga Datt Joshi, First Additional Judge of Aligarh, dated the 15th of December, 1915, reversing a decree of Kaulashar Nath Rai, Munsif of Bulandshahr, dated the 18th of September, 1915.

(1) (1906) I. L. R., 29 Mad., 336. (4) (1883) 8 A. C., 467.

(2) (1913) I. L. R., 38 Mad., 519. (5) (1906) I. L. R., 31 Bom., 165.

(3) (1914) I. L. R., 42 Calc., 801. (6) (1900) I. L. R., 24 Bom., 400.

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Ram Baksh v. Mughlani Khanam (1), *Begam v. Muhammad Yaqub* (2), *Muhammad Talib Husain v. Inayat Jan* (3), *Jhamplu v. Kutramani* (4) and *Maung Shwe Goh v. Maung Inn* (5) referred to.

By a registered sale deed, dated the 14th of August, 1905, the appellant sold the zamin lari property in suit together with other property to Muhammad Ali Jan Khan. On the same date Muhammad Ali Jan Khan sold to the appellant by means of a registered sale-deed a certain shop together with some other property. A few days afterwards an exchange took place between the parties by a parole agreement, and by virtue of it the zamindari property in suit and the shop went back to their respective former owners. No written instrument of exchange was executed. Possession of the property in suit remained all along with the appellant; Muhammad Ali Jan Khan had effected mutation in his favour of the other property purchased by him under the deed of the 14th of August, 1905, but not of the property in suit. The shop remained in the possession of Muhammad Ali Jan Khan, and after his death in 1910, was sold, on the 21st of February, 1911, by his heirs. On the 4th of August, 1915, the heirs of Muhammad Ali Jan Khan brought a suit for recovery of possession of the property in suit on the basis of the sale-deed of the 14th of August, 1905. The court of first instance held that the transaction of exchange set up by the defence was proved, and the suit was dismissed. The lower appellate court held that as a matter of fact the exchange had taken place but that, as it had not been effected by a registered instrument, the exchange was invalid, and on that finding decreed the suit. The appeal to the High Court came up before a single Judge who remanded an issue as to the valuation of the property in suit and of the shop, respectively, at the time of the sale-deeds of 1905. The finding returned was to the effect that the value of each was over Rs. 100. The case was then referred to a Bench of two Judges.

Maulvi *Iqbal Ahmad*, for the appellant :—

Section 118 of the Transfer of Property Act read with section 54 of that Act no doubt requires that an exchange of properties of the value of Rs. 100 or upwards must be made

(1) (1908) I. L. R., 26 All., 263.

(3) (1911) I. L. R., 33 All., 683.

(2) (1894) I. L. R., 16 All., 344.

(4) (1917) I. L. R., 39 All., 696.

(5) (1916) I. L. R., 44 Cal., 542.

by a registered instrument. But the absence of a registered instrument would not necessarily entitle the plaintiffs to a decree. In this case according to the findings arrived at by the courts below the arrangement was carried out by the parties and complete effect was given to it. The acts of the parties based on and in accordance with the arrangement arrived at between them would cure the defect of want of a registered deed of exchange. Equity would not allow a Statute to be made an instrument of fraud; *Halsbury* : Laws of England, Vol 13, p. 75. Equity will support a transaction though clothed imperfectly in legal forms where the agreement has been acted upon by the parties; *Mahomed Musa v. Aghore Kumar Ganguli* (1). I am also supported by the case of *Jhamplu v. Kutramani* (2). Further, the plaintiffs are not entitled to the relief claimed, because having transferred the shop to a person who is a *bond fide* purchaser without notice, they are not in a position to restore to the defendant that for which the property in suit was exchanged; for, he who seeks equity must do equity.

Dr. S. M. Sulaiman, for the respondents:—

The provisions of section 54 of the Transfer of Property Act are imperative. Consequently, the exchange set up by the defendant was not effective in law and the proprietary right in the share in dispute continues in the plaintiffs and did not pass to the defendant. The plaintiffs are therefore entitled to a decree for possession of the property. Where the words of a Statute are clear and unambiguous no equitable considerations ought to be allowed to modify them. To hold that an oral agreement acted upon by the parties can take the place of a registered instrument as required by section 54 would render that section nugatory. It will also lead to insecurity of title and open the door to perjury and fraud; *Kurri Veerareddi v. Kurri Bapireddi* (3) and *Chidambara Chettiar v. Vaidilinga Padayachi* (4). The principle that equity considers that as done which ought to have been done has no application if in the result it defeats the express provisions of the law; *Sumsuddin Goolam Husein v. Abdul Husein Kalimuddin* (5).

- (1) (1914) I. L. R., 42 Cal., 801. (3) (1906) I. L. R., 29 Mad., 336.
 (2) (1917) I. L. R., 39 All., 696. (4) (1913) I. L. R., 38 Mad., 519.
 (5) (1906) I. L. R., 31 Bom., 165.

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Maulvi *Iqbal Ahmad*, was heard in reply.

WALSH, J.—The facts of this case as found in both courts are simple, but the question of law is one of some importance. By a duly registered sale-deed, the defendant, Musammat Salamat-uz-Zamin, about the 14th of August, 1905, sold and transferred to one Muhammad Ali Jan Khan (*inter alia*) the two and half biswansis of land now in suit. On the same date Muhammad Ali Jan Khan by another duly registered sale-deed, sold and transferred to Musammat Salamat-uz Zamin (*inter alia*) a certain shop in Bulandshahr. The value of the shop on the said date has been found to have been Rs. 125, and the value of the land now in suit has been found to have been Rs. 100. Shortly after these two sale-deeds, Muhammad Ali Jan Khan and the defendant verbally agreed to re-transfer or to exchange these two properties which each had thus purchased from the other, and each remained in possession of what had originally been transferred by the deeds. Neither purchaser had any property in the district in which the property originally transferred to him by his deed was situate, and, although it is not found, and therefore is not material to any point we have to decide, it is probable that the original inclusion of the two properties in the deeds of sale was only with the object of defeating, or technically complying with, the registration law. From the date of the agreement to re-transfer, or exchange, the two remained in possession of the original properties, and treated them as their own. Muhammad Ali Jan Khan was a mukhtar. He obtained mutation of the other properties purchased by him from the lady, but not of the land now in suit. He died about five years afterwards, and at the date of his death the shop which he had agreed to take back in exchange, being still in his possession, was treated as part of his inheritance, and in February, 1911, was sold by his heirs to his widow, with the rest of his property in lieu of dower. In fact every thing was done as regards the property in suit and the shop which it was agreed to exchange for it, as though the exchange had been formally carried out, as it ought to have been, by a registered instrument under sections 118 and 54 of the Transfer of Property Act (IV of 1882), except that there was no writing of any kind on either side. The plaintiffs, who

are some of the heirs of Muhammad Ali Jan Khan and who sue in that capacity, now claim the land originally sold and transferred to him by the said deed. Both courts below are in agreement as to the facts above stated. The first court dismissed the suit. The lower appellate court reversed this decision upon the ground that the exchange was "not valid," or in other words, that there was no transfer by a registered instrument and no delivery of possession. The question which we have to decide is whether under the general principles of law in this country a transaction of this kind, so acted upon by the parties, has become effectually binding upon them, in spite of the fact that the provisions of sections 54 and 118 have not been complied with.

This question turns upon the further question whether the *dicta* of the Privy Council in *Mahomed Musa v. Aghore Kumar Ganguli* (1) apply to this and other similar cases. In England if the question arose under the analogous case of the Statute of Frauds, and the contention was that no interest in the land had passed, because the contract not being in writing, did not comply with the provisions of the Statute, the plaintiff's position would be quite untenable. As to this the law has been well settled since *Maddison v. Alderson* (2), where Lord SELBORNE with the concurrence of the other members of their Lordships' House said that in a suit founded on performance, or part performance, the defendant (in this case the plaintiff) is "really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute of Frauds) upon the contract itself. If such equities were excluded, injustice of a kind which the Statute cannot be thought to have had in contemplation would follow."

The case in the Privy Council above mentioned arose out of some mortgage transactions of 1848, and 1871, respectively. Differences arose between the parties. A suit was brought and a compromise was reached by which the mortgage debts were to be paid off and the properties were to be legally conveyed by the mortgagor to the parties entitled to them in certain shares. A decree was made that the suit was decided in terms of the compromise and struck off. No conveyances were executed in

(1) (1914) I. L. R., 42 Cal., 801 (817-18.) (2) (1883) 8. A. C., 407.

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completion of the contract of compromise, nor was the compromise registered. But it was acted upon by the parties for a period of from 30 to 40 years. The Privy Council held that, though the compromise and decree taken together might be considered defective or inchoate as a validly concluded agreement, the acts of the parties had been such as to supply all defects. It was strongly contended that the document of compromise being unregistered was inadmissible, that oral evidence was inadmissible, that there had been no transfer, and that the acts of the parties conferred no title. In the judgement of their Lordships, delivered by Lord SHAW, it was pointed out that at that date no written conveyance was required by the law of India, and that the Transfer of Property Act, 1832, did not apply. But "in view of the argument strongly pressed upon them their Lordships think it right to say," that "the laws of India and of England follow the same rule" and, following the principle of *Maddison v. Alderson* (1), "equity will support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon."

In my opinion this is an authoritative statement of the law binding upon the courts in India, and applicable to the case, as the facts have been found now before us. Its binding effect can only be questioned in so far as it can be shown that there is some express statutory enactment inconsistent with it, and not present to their Lordships' mind. In my opinion section 54 is not inconsistent with it and, moreover, it must have been present to their Lordships' mind. The defendant in this case is not relying upon a document of transfer, but upon the complete performance of a contract for sale by exchange.

Of the most recent authorities in this country, in which this question of principle has arisen, there are some in which the view of the Privy Council has clearly been acted upon, and there are none which suggest any special feature of the law of India which would appear likely to have affected their Lordships' opinion if their attention had been drawn to it.

In *Sumsuddin Goolam Husein. v. Abdul Husein Kalimuddin* (2) JENKINS, C.J., said that the chance of an heir-apparent

(1) (1883) 8 A C 467.

(2) (1906) 1 L. R. 81 Bom, 165.

succeeding was not transferable, and it could only be bound, if at all, by the application of the principles of equity, and that they could not be applied because *the property in question belonged to a category, the transfer of which was prohibited altogether*

In *Karalia Nanubhai Mahomedbhai v Mansukhran Vakhatchand* (1) JENKINS, C J., had given effect to the principle by holding that a judgement-debtor who had sold certain land and delivered possession thereof and been paid the purchase money, had no attachable interest, although there had been no transfer by him within the meaning of section 54. It follows logically from this decision that if he had lost all interest in the land, his purchaser must have acquired it, though there was no transfer.

This case, and the case of *Ram Bakhsh v. Mughlan Khanam* (2), to which reference will be made hereafter, were definitely said not to be good law in the Madras Presidency by the court which decided *Chidambara Chettiar v. Vaidilinga Padayachi* (3), following the so-called Full Bench decision in Madras in *Kurri Veerareddi v Kurri Bapireddi* (4). This latter decision was the authority most relied upon by the respondent in the present appeal. It would, therefore, appear that there is a conflict of opinion, upon the application of the principles above stated to cases in India, between the Madras and the Allahabad decisions, and the question really is whether the more recent pronouncement of the Privy Council has solved this doubt

The Madras case was decided by the CHIEF JUSTICE, and two Judges. The CHIEF JUSTICE evidently entertained considerable doubt. In that case there was an agreement for sale, followed by delivery of possession to the purchaser and payment of the price. It was held that section 54 was imperative, and unless complied with, equity could not uphold the transaction. The CHIEF JUSTICE referred to the considerations of public policy, namely, the intention of the Legislature to minimize the chances of litigation, and the opportunity for perjury. These are equally applicable, if relevant, to the English Statute of Frauds. It is not easy to follow the distinction drawn by the learned CHIEF JUSTICE between the English and the Indian law. He takes the view that the

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(1) (1900) 1 L. R., 24 Bom., 400.

(3) (1903) 1 L. R., 38 Mad., 519

(2) (1903) 1 L. R., 26 All., 266.

(4) (1906) 1 L. R., 29 Mad., 336.

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courts in India are under no obligation to engraft the English decisions upon the Transfer of Property Act, and discusses the principles of the interpretation of Statutes. But the question is not one of the interpretation of the Statute. There is admittedly no "transfer" within the meaning of the section. But the section does not *prohibit* the vesting of title to or interest in property unless effected by a formal transfer. The cases which have dealt with the matter upon the principle that there can be no estoppel in the case of a statutory prohibition, are open to the same criticism, as the case of the defendant before us does not rest upon the doctrine of estoppel as applied to an admittedly invalid transfer. The learned CHIEF JUSTICE points out that at that date (1904) the Indian authorities were in conflict, and it is not therefore profitable to examine them in detail. There are, however, four cases in which the principle now contended for on behalf of the appellant has been applied by this High Court, *Begam v. Muhammad Yakub* (1), by a Bench of six Judges (of whom one dissented), vide the judgement of EDGE, C J., on p. 350; *Ram Bakhsh v. Mughlani Khanam* (2), in which it was held that section 54 did not apply; *Muhammad Talib Husain v. Inayati Jan* (3), in which the section was not referred to, and the recent case of *Jhamplu v. Kutramani* (4), decided by my brother TUDBALL and myself. In the latter case there had been a relinquishment by the acts of the parties, which had originally been attempted to be carried out by an unregistered document, and adverse possession for the statutory period. The question was whether the unregistered document was admissible to explain the possession. The same point had been taken in the Privy Council in *Mahomed Musa v. Aghore Kumar Ganguli* (5). Admittedly there had been no transfer, but we held that the document was admissible, and that the evidence supported the title of the party in whose favour the informal relinquishment had been made and the statute of limitation had run. I adhere to the view I then expressed that the judgement of the Privy Council as to the law in India was decisive upon the point.

(1) (1894) I. L. R., 16 All., 344. (3) (1911) I. L. R., 33 All., 683

(2) (1908) I. L. R., 26 All., 266 (4) (1917) I. L. R., 39 All., 696.

(5) (1914) I. L. R., 42 Cal., 801.

Although it is not customary to refer to the works of living authors, I observe that in discussing this question Dr. Gour in the fourth edition of the " Law of Transfer " Vol. I, p. 602, takes the other view, and referring to *Karalia Nanubhai Mahomedbhai v. Mansukhram Vakhatchand* (1) and *Ram Bakhsh v. Mughlani Khanam* (2) says that ' these cases are founded on no intelligible principle and if accepted would have the effect of overriding the clear provisions of the law ' This is rather severe on the Privy Council, and is supported in the main by reliance upon the Madras cases cited above. However, in the addenda to Vol. III contained in the reprint which brings the citation of cases up to 1916, he refers to his notes above mentioned and says :— " but see *Mahomed Musa v. Aghore Kumar Ganguli* " (3) indicating that in his view the Privy Council has in that case decided otherwise.

From all these authorities it appears that there is nothing inconsistent in India with the rule of law in England on this matter, unless it be section 54 of the Transfer of Property Act, and that this difficulty has been removed by the *dicta* of the Privy Council which are in my opinion binding upon us.

The question of limitation was not raised in the case in the Privy Council, and is not raised in the suit now under appeal. It is clear, however, from the judgement delivered by Lord SHAW that he was dealing with the period which had elapsed only as one of the details of the history, and not as a matter of principle.

This view is not inconsistent with the decision of the Privy Council in *Maung Shwe Goh v. Maung Inn* (4). Even accepting the *dictum* in the head-note, which, however, goes far beyond what was said by the Lord CHANCELLOR, the point in that case was, what were the rights of the parties under a decree for specific performance of a contract which had not been performed. Under an inchoate contract which remains unperformed in India, section 54 of the Transfer of Property Act prevents the purchaser being treated as the owner in equity of the estate as he would be treated in England.

In my opinion *Mahomed Musa v. Aghore Kumar Ganguli* (3) in effect overrules *Kurri Veerareddi v. Kurri Bapireddi* (5) and is decisive of this appeal.

(1) (1900) I. L. R., 24 Bom., 400. (3) (1914) I. L. R., 42 Calc., 801.

(2) (1908) I. L. R., 26 All., 236. (4) (1916) I. L. R., 44 Calc., 542.

(5) (1900, I. L. R., 29 Mad., 833,

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PIGGOTT, J.—I concur in the proposed order. I feel it incumbent on me to say that I am unable to apply the *dicta* of their Lordships of the Privy Council in *Mahomed Musa v. Aghore Kumar Ganguli* (1), to the facts of the present case so as to hold that there has been a valid transfer of the property in suit by way of exchange. Their Lordships were dealing with a suit to redeem a mortgage, and they held that the mortgage had long before been extinguished by act of parties. It is nowhere laid down in the Transfer of Property Act (IV of 1882), that redemption of a mortgage can be effected only by a registered instrument. Where the statute requires that a particular kind of transfer (as for instance a mortgage) shall be effected by a particular kind of instrument, it seems to me that their Lordships have always enforced such a provision with great stringency, as for instance in the importance attached to the word “attested” in section 59 of the Transfer of Property Act.

I think therefore that on the facts as found I must regard the plaintiffs as being in law the owners of the property in suit. It does not follow that they are entitled to present possession as against the defendants, who are obviously not mere trespassers. There has been a contract of exchange, partly executed by what must be regarded as equivalent to mutual delivery of possession, all that was required for complete execution of the contract was a registered instrument. There is no reason why the law should not hold the parties bound by the contract so far as it was carried into effect and by the equities arising out of their own acts.

The contract between the parties clearly involved this agreement, that the defendants should not be disturbed in their possession of the Jafarabad property so long as Muhammad Ali Jan Khan or his successors retained the Bulandshahr shop, dealt with it as their own and did not make it over to the defendants. I do not think the plaintiffs are by law estopped from calling themselves the owners of the Jafarabad property; but I think they are bound, under the circumstances, by an agreement which the court will recognize and enforce, not to eject the defendants from the same. The case for the present defendants is stronger than that

(1) (1914) I. L. R., 42 Cal., 801.

which found favour with a Bench of this Court in *Ram Bakhsh v. Mughlani Khanam* (1). I agree therefore that the decree of the lower appellate court must be set aside and that of the court of first instance restored. The plaintiffs will pay all costs throughout.

BY THE COURT.—The order of the Court is that this appeal is allowed, the decree of the lower appellate court is set aside and that of the court of first instance is restored. The plaintiffs will pay all costs throughout.

Appeal allowed.

Before Sir Henry Richa ds, Knight, Chief Justice, and Justice Sir Pramada Chavan Banerji

GOBIND DAS AND ANOTHER (DECREE-HOLDERS) v. KARAN SINGH AND OTHERS (OBJECTORS).*

Act No. III of 1907 (Provincial Insolvency Act), section 23—Insolvency—Attachment of applicant's property prior to adjudication—Effect of adjudication on the attachment.

After an adjudication in insolvency, an attachment of property, though made before the adjudication, ceases to have any effect, and the property of the insolvent vests in the receiver, who is the person to maintain all proceedings.

Where no receiver is actually appointed, the Court is the receiver under section 23 of the Provincial Insolvency Act

THE facts of this case were as follows :—

One Ganpat Singh applied on the 30th of January, 1917, to be adjudged insolvent and was so adjudged on the 17th of March, 1917. Gobind Das, a creditor, who had not proved his debt, but had obtained a decree against Ganpat Singh, applied to the Munsif of Lalitpur to attach certain movable property in execution of the decree. An order for attachment was made the same day and attachment was made on the 31st of March, 1917. Karan Singh and two others put in a claim in the Court of the Munsif, alleging that the property attached was theirs and did not belong to Ganpat Singh. The Munsif dismissed the objection and held that the property under attachment was at the disposal of the insolvency court.

* First Appeal No. 115 of 1917, from an order of H. J. Bell, District Judge of Jhansi, dated the 26th of June, 1917.

(1) (1903) I. L. R., 26 All., 226.

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The claimants to the property under attachment, filed objections in the court of the District Judge of Jhansi. The District Judge allowed the objections. From that order of the District Judge, the decree holder Ganpat Singh and his son appealed to the High Court.

Babu *Gurdhari Lal Agarwala*, for the appellants.

Babu *Piari Lal Banerji*, for the respondents.

RICHARDS, C. J., and BANERJI, J. :—A preliminary objection is taken to the hearing of this appeal that the appellants have no *locus standi*. The dispute is about the property in certain buffaloes. The appellants alleged that these buffaloes belonged to the insolvent. It appears that the appellants were decree-holders and had attached the buffaloes just before the adjudication in insolvency. Upon the adjudication in insolvency the attachment ceased to have any effect. All the property of the insolvent vested in the receiver. In this particular case there was no actual receiver appointed, but the court itself in such cases is the receiver (See section 23). In our opinion the preliminary objection has force and must prevail. We dismiss the appeal with costs.

Appeal dismissed.

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 January, 19.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Chandra Banerji

JURAWAN PASI AND OTHERS (JUDGEMENT-DEBTORS) v MAHABIR DHAR
 DUBE AND ANOTHER (DECREE-HOLDERS)*

Civil Procedure Code (1908), section 48—Execution of decrees—Limitation "Subsequent order"—Order by executing court giving time for payment—Act No. IX of 1908 (Indian Limitation Act), section 15.

The expression "subsequent order" in section 48 (b) of the Code of Civil Procedure, means a subsequent order made by the court which made the decree and acting as that court and not an order of a court executing the decree. An order made by a court executing a decree, allowing a judgment-debtor time to pay up the balance of the decretal money would not be a subsequent order within the meaning of section 48 and would not give a fresh period to the decree-holder to execute his decree. Nor is an order merely giving time for payment an order staying execution or an injunction, and the time so given cannot be excluded in computing limitation against the decree-holder.

* Second Appeal No. 596 of 1917, from a decree of E. Bennet, Additional Judge of Gorakhpur, dated the 21st of March, 1917, reversing a decree of Girish Prasad, Munsif of Bansi, dated the 27th of November 1916.

THE facts of this case were as follows :—

A decree was passed by the Munsif of Bansi on the 28th of July, 1904, and, after certain applications for execution, an application was presented on the 31st of March, 1915, asking for the attachment and sale of certain property. On the 23rd of September, 1915, the judgement-debtors paid a sum towards the decree and asked for two months' time within which to pay up the balance of the decretal amount. The court executing the decree passed an order granting two months' time and struck off the application for execution of the 23rd of September, 1915. The present application for execution was filed on the 6th of September, 1916, and the relief claimed was arrest of the judgement-debtors. The judgement-debtors objected that, as the application was presented more than 12 years after the decree, no order for execution could be made. The Munsif allowed the objection and dismissed the application. On appeal the Additional District Judge held that the application was not barred as a fresh period would be calculated from the part-payment on the 23rd of September, 1915, and that it was also within time under schedule II, article 179 (4), of the Limitation Act of 1877.

The judgement-debtors appealed. The appeal came on for hearing before TUDBALL, J., who referred it to a Bench of two Judges.

Babu *Piari Lal Banerji*, for the appellant :—

The present application was a fresh application and could not be treated as a continuation of the application of the 23rd of September, 1915, as the reliefs asked for in the two applications were entirely separate; *Mewa Lal v. Ahmad Ali* (1). The application may be within time as prescribed by article 182 (5), Limitation Act of 1908, corresponding to section 179 of the Act of 1897, but those articles are controlled by section 48 of the Civil Procedure Code; *Balaram Vithalchand Gujar v. Maruti bin Devji Dubal* (2).

Pandit *Radha Kant Malaviya*, for the respondent :—

The decision of the learned Judge is not right, but the application is within time having regard to section 48 (b) of the Code and section 15 of the Limitation Act. In the present case,

(1) (1911) 9 A. L. J., 17. (2) (1914) I. L. R., 39 Bom., 256.

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although the decree was dated the 28th of July, 1904, there was a "subsequent order" on the 23rd of September, 1915, which directed payment of money after two months from the date, consequently 12 years would run from the expiry of those two months on the 23rd of November, 1915.

The decree-holder never objected in this case, he accepted the money and the judgement-debtors having enjoyed the benefit of the adjournment cannot now plead that the order was bad as made without the consent of the decree-holder. The order of the 23rd of September, 1915, had the effect of modifying the decree. Reference was made to *Tata Charlu v. Konadala Ramachandra Reddi* (1) and *Perumal Naickar v. Sheikh Daud Rawther* (2). Again; under section 15 of the Limitation Act, in computing the period of 12 years the period of two months during which the execution was stayed should be excluded. The section does not say so, but it is wide enough to affect any period of limitation prescribed in any enactment. This section did not contain the words used in section 6, which had been held not to affect section 48, Civil Procedure Code, because of the words "prescribed in the third column of the first schedule"; *Prem Nath Tiwari v. Chatarpal Man Tiwari* (3).

Babu Piari Lal Banerji, in reply :—

There is no subsequent order in this case directing payment of the money. Order XX, rule 11, gives power to the court which passed the decree to modify its decree. It does not refer to the executing court at all. In the present case, the application for time was made to the executing court and the order of the 23rd of September, 1915, was not one under order XX, rule 11. An order passed in the case of execution granting time to the judgement-debtor was not a subsequent order within the meaning of section 48 (b) of the Code. He discussed *Bal Chand v. Raghunath Das* (4), *Jogobundhoo Dass v. Hori Rawoot* (5) and *Raghunath Prosad v. Kashi Prosad* (6). The provisions of the Limitation Act dealing with the mode of computation of periods of limitation cannot apply to section 48, Civil

(1) (1883) I. L. R., 7 Mad., 152. (4) (1881) I. L. R., 4 All., 155

(2) (1910) 34 Indian Cases, 862. (5) (1888) I. L. R., 16 Cal., 16.

(3) (1915) I. L. R., 37 All., 688. (6) (1912) 13 Indian Cases, 88.

Procedure Code. This section does not enact a rule of limitation at all, but merely lays down a period after which any application for execution, though not barred by limitation, will not be granted.

RICHARDS, C. J., and BANERJI, J. :—This appeal arises out of execution proceedings. The decree was dated as far back as the 28th of June, 1904. In March, 1915, an application was made for execution by attachment of certain property of the judgement-debtors. On that application (on the 23rd of September, 1915), two months' time was granted to the judgement-debtor to pay the balance of the decretal amount he having paid Rs. 22 on account. No further step appears to have been taken on this application and it was struck off. On the 6th of September, 1916, the present application was made. It sought execution in a different way. The application of the 31st of March, 1915, was for execution by attachment of property. In the application of the 6th of September, 1916, execution was sought by the arrest of the judgement-debtor. The judgement-debtor raised an objection that, having regard to the provisions of section 48 of the Code of Civil Procedure, the decree being now more than twelve years old, an order for execution could not be made. The first court allowed the objection. The learned District Judge upon appeal held, first, that the application was within time, holding that the twelve years mentioned in section 48 ran from 1915, and secondly, that the application was within time, under article 179, clause (4), of the Limitation Act. The judgement-debtor has appealed. The learned vakil for the decree-holder admits that article 179, clause (4), of the Limitation Act does not apply, but he contends that the order of the 23rd of September, 1915, when the judgement-debtor was allowed two months to pay the decree was a "subsequent order" within the meaning of that expression in section 48, clause (b), of the Code of Civil Procedure, and secondly, that in calculating the period of twelve years mentioned in section 48 of the Code of the Civil Procedure, the two months which were given to the judgement-debtor by the order of the 23rd of September, 1915, should be excluded, having regard to the provisions of section 15 of the Limitation Act. Amongst the

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authorities cited by each side were *Prem Nath Tiwari v Chatarpal Man Tiwari* (1), *Jogobundhoo-Dass v Hori Rawoot* (2), *Balchand v. Raghunath Das* (3), *Raghunath Prosad v. Kashi Prosad* (4), *Tata Charlu v. Konadala Ramachandra Reddi* (5), *Perumal Naickar v. Sheikh Darwood Rawther* (6).

Section 48 of the Civil Procedure Code, is as follows:—
 “Where an application to execute a decree, not being a decree granting an injunction, has been made, no order for the execution of the same decree [shall be made upon any fresh application presented after the expiration of twelve years from (a) the date of the decree sought to be executed, or (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree”

As already mentioned, it is contended that the order of the 23rd of September, 1915, giving the judgement-debtor two months' time is a subsequent order directing the payment of the balance of the money. It must be remembered that this order was made by the *court executing the decree*. It may perhaps have so happened in this case that it was the same court which granted the decree of the 28th of June, 1904, that was executing the decree. But if the argument put forward by the decree-holder is good, it would equally apply to a case where the decree had been merely transferred to another court for execution. It would almost seem to follow that even an adjournment of an application for execution would give a fresh period of twelve years from the expiry of the period of adjournment. After consideration, we have come to the conclusion that a subsequent order directing payment of money in section 48, clause (b), means a subsequent order made by the court which made the decree and acting as that court, and not an order of a court executing a decree. In all probability the section contemplates orders made under order XX, rule 11. We may say in passing that the order of the 23rd of September,

(1) (1915) I. L. R., 37 All., 698.

(4) (1912) 13 Indian Cases, 88.

(2) (1889) I. L. R., 16 Cal., 16

(5) (1883) I. L. R., 7 Mad., 152

(3) (1881) I. L. R., 4 All., 155.

(6) (1916) 34 Indian Cases, 393.

1915, was not made under order XX, rule 11. As to the argument put forward grounded on the provisions of section 15 of the Limitation Act, this section runs as follows:—"In computing the period of limitation prescribed for any suit or application for the execution of a decree the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded." In the first place, the order of the 23rd of September, was not strictly an order staying the execution of the decree. Furthermore, the Limitation Act itself prescribes periods of limitation for bringing suits and periods of limitation for the execution of decrees, and it seems pretty clear that the word "prescribed" in this section refers to periods prescribed by the Limitation Act. Section 48 of the Code of Civil Procedure does not in a strict sense provide a "period" of limitation. It is an enactment which forbids an order for execution upon a decree which is more than twelve years old. We must allow the appeal, set aside the order of the court below and restore the order of the court of first instance with costs in all courts..

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Appeal allowed.

*Befo e Sir Hen y Richards, Knight, Chief Justice and Justice Sir Pramada
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 January, 5.

NIZAM-UD-DIN SHAH (DEPENDANT) v BOHRA BHIM SEN (PLAINTIFF)*
*Civil Procedure Code (1908), o der XXXIV, rule 5—Suit fo sale on a mortgage
 —Application for final decree—Limitation—Act No IX of 1908 (Indian
 Limitation Act), schedule I, article 181*

An application for a final decree under order XXXIV, rule 5, of the Code of Civil Procedure is an application in the suit and not an application in execution; the limitation applicable is that prescribed by article 181 of schedule I to the Indian Limitation Act, 1908, and time begins to run, if there has been an appeal in the suit, from the date of the decree of the final court of appeal. *Gagadhar Singh v. Kishan Jiwan Lal* (1) referred to

THE facts of this case, so far as they are necessary for the purposes of this report, were as follows:—

A suit for sale on a mortgage was instituted in 1911, and the High Court in appeal made a decree on the 17th of June, 1912.

*First Appeal No. 821 of 1916, from a decree of Khwaja Abdul Ali, Subordinate Judge of Agra, dated the 21st of July, 1916.

(1) (1917) I. L. R., 39 All., 641.

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On the 16th of March, 1916, the decree holder made an application for a decree absolute under order XXXIV, rule 5, of the Code of Civil Procedure against the heir of the original judgment-debtor. He objected that the property was *wagf* and the application was time-barred. The court below disallowed the objections. The objector thereupon appealed to the High Court.

Mr. B. E. O'Connor (Mr. S. A. Raoof with him), for the appellant.

Pandit M. L. Sandal, for the respondent.

RICHARDS, C J, and BANERJI J. with whom the other judges connected with this appeal are as follows:—A suit was instituted in the year 1911, on foot of a mortgage. Two persons were made defendants to this suit, namely one Musammat Kadri Begam and Nizam-ud-din Shah. The usual preliminary decree was granted by the court of first instance. Two appeals were filed in the High Court, which dismissed the suit against Nizam-ud-din Shah, but gave a decree against Musammat Kadri Begam. The High Court's decree was dated the 17th of June, 1912. The Court does not appear to have been asked to extend the time and did not do so. The present application was one made on the 16th of March, 1916. The application stated that Musammat Kadri Begam, the sole defendant, had died and that Nizam-ud-din Shah was her heir. The application was one for the preparation of a final decree under order XXXIV, rule 5. Several objections were taken by Nizam-ud-din Shah. He tried to set up that the property was *wagf*. He also objected that the application for the decree was beyond time and that Musammat Kadri Begam had died more than six months before the application was made. The court below held, and we think rightly held, that Nizam-ud-din Shah could not set up the plea that the property was *wagf*. He could only make such objections to the execution of the decree as Musammat Kadri Begam whose heir he was, could have made and she could not have raised the objection that the property was *wagf*. The learned Subordinate Judge overruled the other two objections based on limitation. This Court has held in a case like the present that the High Court's decree is the decree in respect of which an application for a final decree is to be made. It has also held that article 181, schedule I, of the Limitation Act

is the proper article and that time begins to run from the period for payment fixed by the High Court's decree, see *Gajadhar Singh v. Kishan Jiwan Lal* (1). Applying this authority to the present case time began to run from the 17th of June, 1912. The application was accordingly clearly beyond time. Section 6 of the Limitation Act will not help the plaintiff, because that section only applies to the time for the institution of suits or the time for an application for the execution of the decrees. An application for a final decree in a mortgage suit is not an application for execution of a decree. It is clear, therefore, that the application was beyond time. It is admitted that Musammat Kadri Begam died more than six months before the application was made. Order XXII, rule 4, provides that where a sole defendant dies and the right to sue survives the court on an application made in that behalf shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. Sub-section (3) further provides that where within the time limited by law no application is made under sub-rule (1) the suit shall abate as against the deceased defendant. In the case of *Muhammad Masihullah Khan v. Jarao Bai* (2) it was held that a suit for redemption is still a "pending" suit after a preliminary decree has been made. It would, therefore, appear in the present case that there ought to have been an application to bring the heir of Musammat Kadri Begam on to the record within six months from the date of her death. Otherwise the suit would have abated. It is not, however, necessary for the decision of the present case that we should decide this last mentioned point.

We allow the appeal, set aside the order of the court below and dismiss the application of the respondent. The appellant will have his costs in both courts.

Appeal allowed

(1) (1917) I. L. R., 39 All., 641

(2) (1915) I. L. R., 37 All., 226.

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NIZAM UD-
DIN SHAH

v.
BORRA BHAI
SIN.

1918
January, 7

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Purna da Charan Banerji.

GHULAM MUHL-UD-DIN KHAN AND ANOTHER (DECREE-HOLDERS) v.
DAMBAR SINGH (OBJECTOR) *

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 182—Explanation I—Execution of decree—Limitation Execution of decree of first court and of decree of appellate court for costs carried out separately.

In execution of a decree against S, D attached a decree held by S against himself and others for possession of certain property and costs. This decree had been the subject of an appeal by D and one other of the judgement-debtors which had resulted in a decree for costs against the two appellants only. The last application for execution of this decree was made in 1907. As to the lower court's decree D made various applications for execution and succeeded in realizing all that was due under it. S became insolvent, and the receiver sold to one M whatever rights S may have had under either decree; but on application for execution made by the purchaser, it was held that there was nothing more to realize under the original decree and the execution of the appellate decree was barred by limitation.

ONE Sri Kishan Das obtained a decree for possession and costs (Rs. 887-4) against Karan Singh, Dambar Singh, Ram Chandar Singh and others jointly, on the 6th of August, 1902. Two out of these defendants, viz., Karan Singh and Dambar Singh, appealed to the High Court and their appeal was dismissed with costs (Rs. 1,229-8-3) awarded to Sri Kishan Das. Dambar Singh had obtained a decree against Sri Kishan Das and he attached the decree of Sri Kishan Das mentioned above. As attaching creditor he applied to execute the decree of Sri Kishan Das and on two occasions realized sums of money aggregating a little over Rs. 1,000. He again applied on the 6th of September, 1910, to realize the balance by attachment of certain property belonging to Ram Chandar Singh, defendant, who objected that the sum already realized had satisfied the decree for costs of the first court and he was not liable for the costs of the High Court. His objection was allowed, it being held by the court that the decree for costs of the first court had been satisfied and that the decree which Dambar Singh was executing was the High Court's decree for costs under which Ram Chandar Singh was not liable. This decision was affirmed on appeal by the High Court in E. F. A. 49 of 1912 on the 7th of May, 1912. Sri Kishan Das was subsequently declared an insolvent, and the official assignee, Bombay,

* First Appeal No. 281 of 1917, from a decree of Shams-ud-din Khan, First Additional Subordinate Judge of Aligarh, dated the 12th of May, 1917.

was appointed receiver. A question arose in the course of execution as to whether after, the insolvency of Sri Kishan Das, Dambar Singh, by virtue of his attachment, was entitled to execute the decree or whether by virtue of the insolvency the decree vested in the official assignee and it was ultimately decided by the High Court on the 10th of November, 1917, that the effect of the insolvency was to vest the decree in the assignee and that Dambar Singh could not execute the decree. This decision is reported in *Dambar Singh v. Munawar Ali Khan* (1). The official assignee transferred the decree to Chaudhri Ghulam Muhi-ud din Khan who applied for substitution of his name to execute the decree under order XXI, rule 16. The court below dismissed the application as barred by limitation. Chaudhri Ghulam Muhi-ud-din Khan appealed.

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Munshi *Panna Lal*, for the appellant :—

Although Dambar Singh was one of the judgement debtors of Sri Kishan Das, he was competent to attach the decree in execution of his own decree against Sri Kishan. This had been held in respect of this very decree in an earlier execution; *Kalyan Singh v. Dambar Singh* (2). Consequently any applications for execution made by Dambar Singh would enure to the benefit of the present applicant. It is true that Dambar Singh did not take out execution against himself, but execution taken out against any judgment-debtor would save time against all the judgement-debtors, *vide* Limitation Act, article 182, explanation I. The present application against Dambar Singh was therefore within time under article 182, clause (5).

Babu *Piari Lal Banerji*, for the respondent :—

As the result of the court's decision in 1912, the decree for costs of the first court had been satisfied prior to the 6th of September, 1910, and the application which was made on that day was therefore one to execute the decree for costs of the High Court and any subsequent application that was made was also therefore one to execute the High Court's decree for costs. As far as this decree was concerned, it was not against all the defendants jointly, but only against two, Karan Singh and Dambar Singh. There had been no application to execute this decree either against

(1) (1917) I. L. R., 40 All., 86.

(2) (1909) 6 A. L. J. 564

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Karan Singh or Dambar Singh and any application made to execute this decree against persons other than these would not save time against Dambar Singh, as the persons against whom execution was sought were *not jointly liable* with Dambar Singh. An application for execution against one of several judgement-debtors only saves time against the others, if the former is jointly liable with the others, *vide* explanation I, article 182.

Munshi *Panna Lal*, was heard in reply.

RICHARDS, C.J., and BANERJI, J :—The facts of this case are somewhat complicated, but they can be shortly stated. One Sri Kishan Das obtained a decree. The decree was against one Dambar Singh, Karan Singh and certain other persons. The decree awarded possession of certain property and costs against all the judgment-debtors jointly. Karan Singh and Dambar Singh alone appealed to the High Court, which dismissed the appeal with costs against Dambar Singh and Karan Singh. This happened on the 1st of December, 1904. Dambar Singh had a decree against Sri Kishan Das, and he attacked either the first court's decree or both the first court's decree and the decree made by the High Court (it is not quite clear which) in execution of his decree against Sri Kishan Das. From time to time Dambar Singh sought execution against all the judgement-debtors other than himself and Karan Singh. From time to time he realized money as the result of these applications for execution, and eventually it was held that he had realized the amount awarded by the first court's decree. No mention appears ever to have been made specifically of the decree of the High Court, and it would almost seem as if it was the first court's decree, and not the High Court's decree which was being executed by Dambar Singh. So far as the High Court's decree is concerned the last application for execution previous to the present one was in the year 1907. Sri Kishan Das eventually became insolvent, and the present applicants were purchasers at public auction of the assets of Sri Kishan Das, including the decree or decrees to which we have referred above. The present applicant is, therefore, entitled, (provided he is within time,) to execute the decrees which Sri Kishan Das obtained, and the present application was against Dambar Singh for the alleged balance still

due upon foot of the first court's decree and the High Court's decree. It seems to us quite clear that so far as the first court's decree is concerned the full amount was already realized by Dambar Singh before Sri Kishan Das became insolvent. It is argued that the applications which were made from time to time by Dambar Singh, the last of which was admittedly within three years of the present application, saved limitation and entitled the present owner of the decree to apply for execution. We do not think that this can be so in the present case, because the money which it is now sought to realize is really the money due on foot of the High Court's decree, and that decree was against Dambar Singh and Karan Singh only. No previous applications since the year 1907 were made either against Dambar Singh or Karan Singh. This being so, the order of the court below was correct and must be confirmed. We dismiss the appeal with costs.

Appeal dismissed.

Before Sir Henry Richards, Knight, Chief Justice, and Justice

Sir Pramada Charan Banerjee

RAGHUNANDAN LAL AND OTHERS (DECREE-HOLDERS) v BADAN SINGH
AND ANOTHER (JUDGMENT-DEBTORS)*.

Act No IX of 1908 (Indian Limitation Act), schedule 1, article 182(5)—Execution of decrees—Limitation Application not accompanied by a copy of the decrees—Civil Procedure Code (1908), order XXI, rule 11.

An application for execution of a decree which complies with the requirements of clause (2) of rule 11, order XXI, of the Code of Civil Procedure, cannot be said to be an application which is not "in accordance with law" within the meaning of article 182(5) of the first schedule to the Indian Limitation Act, 1908, only because it is not accompanied by a copy of the decree, which may be required by the Court under clause (3) of the rule.

THE facts of this case were as follows :—

An application was made on the 1st of March, 1916, for execution of a decree for sale in a mortgage suit. The application was in writing, and in compliance with the provisions of rule 11(2) of order XXI of the Code of Civil Procedure. It was not, however, accompanied by an affidavit, a receipt of inspection of the registration office, and copies of the *khewat* and

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January, 7.

* First Appeal No. 307 of 1917, from a decree of Shamsuddin Khan, First Additional Subordinate Judge of Aligarh, dated the 27th of April, 1917.

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decree. The court granted time to the applicant to file these documents, and all were subsequently filed, except the copy of the decree. This not having been done, the application was struck off on the 30th of March, 1916. A subsequent application for execution having been made, it became necessary to rely on the application of the 1st of March, 1916, as saving limitation. The court held that the former application was not an "application in accordance with law," and accordingly rejected it. The decree holders appealed to the High Court.

Munshi *Panna Lal*, for the appellants.

Mr. *A. H. C. Hamilton*, for the respondents.

RICHARDS, C J., and BANERJI, J. :—This appeal arises out of an application for execution of a mortgage decree. An application was made on the 1st of March, 1916, and it is admitted that if this application was an application for execution "in accordance with law" the present application is within time. The application was in writing and seems to have complied with all the provisions of order XXI, rule 11. It being an application for the sale of immovable property under a mortgage decree, the provisions of rules 12, 13 and 14 do not apply. The application, however, was unaccompanied by an affidavit, a receipt of inspection of the registration office, and copies of the *khewat* and decree. The court granted time to the applicant to file these documents, and all the documents were subsequently filed, except a copy of the decree. This not being done, the application was struck off on the 30th of March, 1916. The court below held that under these circumstances the application could not be deemed an application "in accordance with law," and so time would run from the previous application for execution and the present application in such case was admittedly beyond time. It seems to us that the view taken by the court below was not correct. No doubt under the provisions of order XXI, rule 11 (clause 3), the court is entitled to require the applicant to produce a certified copy of the decree, and if the applicant does not do so, the court is entitled to reject the application; but the application in the present case when made fulfilled all the requirements of rule 11 necessary to an application for sale of property mortgaged in execution of the mortgage decree. It was only after the application had been

presented that the court made its order that the applicant should produce a certified copy of the decree. This being so, it seems to us that the application was "in accordance with law" and saved limitation. We allow the appeal, set aside the order of the court below and remand the case to that court with directions to re-admit the application and to proceed to hear and determine the application according to law. As we think that the decree-holder ought to have had the necessary documents before the court and that the present appeal is due to his carelessness, we direct the parties to pay their own costs of this appeal.

Appeal allowed.

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*Before Sir Henry Richards, Knight, Chief Justice and
Justice Sir Pramada Charan Banerji.*

NARSINGH DAS (OBJECTOR) v. DEBI PRASAD (DECREE-HOLDER)*

1918
January, 10.

*Execution of decree—Limitation—Decree giving mesne profits to be ascertained
in the execution department—Terminus a quo.*

The decree in a suit for redemption of a usufructuary mortgage provided that certain mesne profits were payable to the mortgagor, the mortgage having been more than satisfied by the profits of the property. The amount of mesne profits was to be ascertained in the execution department. *Held* that as regards execution of the decree in respect of such mesne profits time did not begin to run against the mortgagor until the profits had in fact been ascertained. *Muhammad Umarjan Khan v. Zinat Begam* (1) followed.

THE facts of this case were as follows :—

A suit for redemption was brought in which the plaintiffs, mortgagors, claimed mesne profits on the ground that the mortgage had been satisfied by the usufruct of the property and that a surplus was due to them. The court passed a decree in their favour and directed that the mesne profits should be determined in the execution department. This decree was made on the 22nd of November, 1904. In 1907, the mortgagors applied to have the mesne profits ascertained, and they were finally adjudicated upon in the year 1910. The decree was executed from time to time and various sums were realized. The present application for execution was made on the 18th of April, 1917. It was objected that the application was barred by limitation. The objection was

* First Appeal No. 278 of 1917, from a decree of G. Q. Allen, Subordinate Judge of Jaunpur, dated the 7th of July, 1917.

(1) (1903) I L. R., 25 All., 385

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overruled, and the application for execution was allowed. The judgement-debtor appealed to the High Court.

Babu *Preo Nath Banerji*, for the appellant.

Munshi *Gokul Prasud*, for the respondent.

RICHARDS, C J, and BANERJI, J. :—This appeal arises out of execution proceedings. The original suit was one for redemption, the plaintiffs alleging that they were entitled to possession of the property which had been mortgaged and mesne profits on the ground that the mortgage had been discharged by the usufruct and a surplus was due to the mortgagor. This suit resulted in a decree for possession and a direction for an inquiry as to what amount of mesne profits the plaintiffs were entitled to. The matter had been litigated up to the High Court and its decree was dated the 2nd of November, 1904. In pursuance of the decree directing the inquiry as to mesne profits an application was made for that purpose in the year 1907, and the mesne profits were finally adjudicated upon in the year 1910. The decree was then put into execution and various sums were realized from time to time. The present application for execution was made on the 18th of April, 1917. The application was met with various objections. The objection insisted upon in this Court is that the decree which must be deemed as now executed is the decree of the High Court of 1904, and that accordingly its execution is barred either by the provisions of section 230 of the Code of Civil Procedure of 1882, or by section 48 of the present Code. —These two sections appear to be almost identical, with one exception, namely, that section 230 of the Code of 1882, speaks only of a decree for “ payment of money ” whilst the present Code speaks of decrees generally, except as therein provided. The words of the present Code are “ where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from the date of the decree sought to be executed.” The argument put forward is that the date of the present decree was the 2nd of November, 1904. If this contention be correct the application was undoubtedly time-barred and could not be granted. The matter is not now of any very general importance because

in future all decrees for mesne profits in a suit for recovery of immovable property must be made by the court which grants the decree for possession of the property (the rules provide for the making of a " preliminary " and a " final " decree) The contention put forward on behalf of the respondents is that the court having directed an inquiry as to mesne profits there was no complete, or (to adopt an expression used by their Lordships of the Privy Council) there was no " operative " decree until the mesne profits were ascertained in the year 1910. This very point was considered by a Bench of this Court in the case of *Muhammad Umarjan Khan v. Zinat Begam* (1). The learned Judges in that case referred to the judgement of their Lordships of the Privy Council in *Radha Prasad Singh v. Lal Sahab Rai* (2) and also to a Full Bench decision of the Calcutta High Court. We think that we ought to follow this case, which is in accordance with the practice which has been adopted by the new Code of Civil Procedure and which, moreover, seems to be in accordance with justice. Applying the principle laid down in these cases to the present case, it must be deemed that the " date " of the decree, so far as it related to mesne profits, is the 15th of February, 1910, when the mesne profits were for the first time ascertained. Since that date there have been numerous applications for execution which have saved limitation and made the present application within time. On the general merits we have heard the parties and see no reason to differ from the view taken by the court below. We dismiss the appeal with costs

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr Justice Muhammad Rafiq.

DEBI PRASAD (APPLICANT) v. J. A. H. LEWIS (OPPOSITE PARTY) *
Act No III of 1907 (Provincial Insolvency Act), section 16 (2), clause (a)—Civil Procedure Code, 1908, section 60—Insolvency—Attachment of half the salary of the insolvent.

One of the creditors of a person who had been declared an insolvent by the Small Cause Court Judge of Cawnpore, but who had since obtained employment

* Civil Revision No. 10 of 1917.

(1) (1908) L. L. R., 25 All., 385. (2) (1890) I. L. R., 18 All., 53.

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in the Government Press in Calcutta, applied to the Court for attachment of half the insolvent's salary for the benefit of his creditors. *Held* that it was no valid reason for rejecting the creditor's application that its allowance would not leave the insolvent enough to live on. *Ram Chandra Neogi v. Shyama Charan Bose* (1) and *Tulsi Lal v. Girsham* (2) followed.

THE facts of this case were as follows:—

One J. A. H. Lewis was declared an insolvent on the 21st of February, 1910, by the Small Cause Court Judge of Cawnpore. No receiver was appointed by the court to take possession of the property of the insolvent. The reason probably was that there was hardly any property to be made over; only a few *mondhas* were available at the time. The insolvent left Cawnpore soon after. The applicant says that in 1916, when he went to Calcutta, he learnt that the insolvent was employed in the Government Printing Press. On his return from Calcutta the applicant presented a petition to the Court of Small Causes, Cawnpore, on the 15th of April, 1916, praying that half the pay of the insolvent be attached and realized for the benefit of the creditors. A notice seems to have been issued on the application, to which the insolvent replied by a letter to the court, dated the 15th of May, 1916. In that letter he explained that he was a European, had a large family, was living in Calcutta and his pay was not sufficiently large to admit of half of it being attached. The learned Judge, without fixing a date for hearing and giving notice to the creditor, rejected the application on the 20th of May, 1916, saying that the creditor was absent, the insolvent was a European and his pay was not large enough to admit of half of it being attached. The applicant went in appeal to the District Judge, who upheld the order of the first court.

The applicant thereupon applied in revision to the High Court, Babu *Lalit Mohan Banerji*, for the applicant.

The opposite party was not represented.

MUHAMMAD RAFIQ, J. :—This is an application in revision by one of the creditors calling in question the order of the court below dismissing his application made under section 16 of Act III of 1907. It appears that the opposite party, J. A. H. Lewis, was declared an insolvent on the 21st of February, 1910, by the Small Cause Court Judge of Cawnpore. No receiver was appointed

(1) (1918) 18 C. W. N., 1052.

(2) (1917) 38 Indian Cases, 410.

by the court to take possession of the property of the insolvent. The reason probably was that there was hardly any property to be made over; only a few *mondhas*, I am told, were available at the time. The insolvent left Cawnpore soon after. The applicant says that in 1916, when he went to Calcutta, he learnt that the insolvent was employed in the Government Printing Press. On his return from Calcutta the applicant presented a petition to the Court of Small Causes, Cawnpore, on the 15th of April, 1916, praying that half the pay of the insolvent be attached and realized for the benefit of the creditors. A notice seems to have been issued on the application, to which the insolvent replied by a letter to the court, dated the 15th of May, 1916. In that letter he explained that he was a European; had a large family; was living in Calcutta, and his pay was not sufficiently large to admit of half of it being attached. The learned Judge, without fixing a date for hearing and giving notice to the creditor, rejected the application on the 20th of May, 1916, saying that the creditor was absent; the insolvent was a European, and his pay was not large enough that half of it should be attached. The applicant went in appeal to the District Judge, who upheld the order of the first court. In his application for revision to this Court the applicant contends, and I think rightly, that the reasons given by the courts below are no reasons at all for rejecting his application made under section 16 of Act III of 1907. When an appropriation of the income of an insolvent is made for the benefit of the creditors, the Court usually acts on the principle of giving to the creditors the surplus after allowing sufficient portion of income for the proper maintenance of the insolvent according to his position in life. The statute-law, in this country, has, however, fixed this proportion by section 60 of the Civil Procedure Code, read with section 16, sub-section 2, of Act III of 1907. There is no rule under which such an order as that passed by the courts below can be passed or upheld. I may here mention two cases which bear out the contention of the applicant, *Ram Chandra Neogi v. Shyama Charan Bose* (1) and *Tulsi Lal v. H. Girsham* (2).

I therefore set aside the order of the courts below and direct the court of first instance to attach half the pay of the insolvent. Costs are allowed to the applicant.

Application allowed.

(1) (1913) 18 C. W. N., 1052. (2) (1917) () 38 Indian Cases, 410.

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REVISIONAL CIVIL.

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July, 25.

Before Justice Sir Parnada Charan Bandyopadhyay and Mr. Justice Tudball
BUDDHU MISIR AND OTHERS (DECREE-HOLDERS) v. BHAGIPATHI KUNWAR
(JUDGMENT-DEBTOR) *

Civil Procedure Code (1908), order XXI, rule 95—Execution of decree—Transferee from auction purchase—Order for delivery of possession—Appeal—Revision.

A purchased certain immovable property at an auction sale held in execution of a decree and thereafter transferred the property so purchased to B, the decree-holder. B applied under order XXI, rule 95, of the Code of Civil Procedure for an order for delivery of possession of the property purchased from A, and an order was passed. Held that no appeal lay from the order for delivery of possession. *Bhagwati v. Banwari Lal* (1) referred to.

THE facts of this case were follows :—

Buddhu Misir and others held a decree against Musammat Bhagirathi. In execution of that decree certain immovable property of Musammat Bhagirathi was sold and purchased by one Sukh Narain Lal, a third party. The auction-purchaser, the said Sukh Narain, subsequently sold the property by a private deed to Buddhu Misir and others, the decree-holders. The decree-holders then applied under order XXI, rule 95, of the Code of Civil Procedure, to be put in possession of the property. The auction-purchaser vendor, Sukh Narain Lal, admitted the sale-deed in favour of the decree-holder and supported the latter's application. The judgment debtor objected on the ground that order XXI, rule 95, applied only to an auction-purchaser and a subsequent vendee by private treaty from the auction-purchaser could not apply under that rule. The court of first instance overruled the objection and directed possession to be delivered to the decree-holders. On appeal by the judgment-debtor, the District Judge reversed the order of the Munsif, holding that the auction-purchaser alone could apply to be put in possession under order XXI, rule 95, remarking, "the law even prohibits purchase at an auction sale in the name of another. If the vendee of Sukh Narain were given the aid of the court, the provision of the law just referred to would be defeated." He also held that section 146 of the Code

* Civil Revision No 65 of 1917.

(1) (1908) I. L. R., 31 All., 82.

had no application to the case. He was of opinion that section 146 "was enacted merely because a representative had no remedy under section 108 of the old Civil Procedure Code." He further observed, "there being a special provision in order XXI, rule 95, about possession being delivered only to the auction-purchaser, section 146 does not apply to this case." The decree-holders filed a second appeal as well as applied in revision against the order of the District Judge.

The Hon'ble Dr. *Tej Bahadur Sapru* (with Babu *Kam'a Kant Varma*), for the applicants :—

The District Judge has entirely misunderstood section 146 and order XXI, rule 95, of the Code. The decree-holders, having purchased the property from the auction-purchaser, are, as his representatives, clearly entitled to apply under order XXI, rule 95, read with section 146.

Besides, no appeal lay to the District Judge in this case; *Bhagwati v. Banwari Lal* (1). If no appeal lay to the District Judge, his order made on the judgement-debtor's appeal, is without jurisdiction, and I am entitled to come up to this Court in revision. If the District Judge's order is not *ultra vires*, then I submit that the view of the law taken by him is incorrect and my appeal should be allowed on that ground.

Mr. *Abdul Raoof*, for the respondent :—

The second appeal does not lie, because there is no appeal from an order under order XXI, rule 95, which corresponds to section 318 of the old Code. As for the revision, the appellants have a remedy by suit, and it has been repeatedly held that where another remedy is available, this Court will not interfere in revision. It is, therefore, submitted that the application in revision, should not be entertained.

Dr. *Tej Bahadur Sapru* was not called upon to reply, but referred to *Ram Narain v. Muhammad Shah* (2).

BANERJI and TUDBALL, JJ. :—The facts out of which this application for revision arises are these :—In execution of a decree held by Buddhu Misir and others, the present applicants, the property of the judgement-debtor was sold by auction and was purchased by one Sukh Narain. The auction-purchaser sold the property purchased

(1) (1908) 1. L. R., 31 All, 82 (2) (1914) 12 A. L. J., 899

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by him to the decree-holders. The decree holders purchasers applied for delivery of possession under order XXI, rule 95, of the Code of Civil Procedure. The court of first instance granted their application. An appeal was preferred to the District Judge and he held that the applicants for possession, who were purchasers from the auction purchaser, were not entitled to make an application under order XXI, rule 95, and accordingly set aside the order of the court of first instance. From this order of the learned District Judge the present application for revision has been preferred, and it is contended that the learned Judge had no jurisdiction to entertain an appeal from the order of the court of first instance. The contention is fully supported by the ruling of the Full Bench in the case of *Bhagwati v. Banwari Lal* (1). That was, no doubt, a case under section 318 of the Code of Civil Procedure of 1882; but the place of that section has been taken by order XXI, rule 95, of the present Code. It is clear, therefore, that the court below acted without jurisdiction in entertaining an appeal from the order of the court of first instance. Moreover, in our opinion, in view of the language of section 146 of the Code of Civil Procedure, the applicants were entitled to maintain their application though they were transferees from the auction-purchaser and were not themselves the auction purchasers. On behalf of the opposite party we are asked not to interfere, as it is the practice of this Court not to exercise its powers of revision in cases in which another remedy is open to the applicant, that remedy being a suit for possession. No doubt ordinarily this Court would not interfere in revision in a case where a remedy is open to a party. But, as observed in *Ram Narain v. Muhammad Shah* (2), each case must be judged upon its peculiar circumstances. In the present case there were no complicated questions of fact or law, and the applicants were clearly entitled to obtain possession by virtue of their purchase from the auction-purchaser. We allow the application, set aside the order of the court below, and restore that of the court of first instance with costs in all courts.

Application allowed

(1), (1908) I. L. R., 81 All., 68.

1914) 12 A. L. J., 899.

APPELLATE CIVIL.

*Before Sir Henry Richards, Knight, Chief Justice, and
Justice Sir Pramada Chandra Banerji.*

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November, 7.

KIRPA DEVI (PLAINTIFF) v RAM CHANDAR SARUF (DEFENDANT) *
*Act (Local) No II of 1901 (Ag a Tenancy Act), sections 175, 177, 193—Order
passed by a Revenue Court staying or refusing to stay a suit—Appeal.*

Held that no appeal will lie to the High Court from the order of a Court
of Revenue staying, or refusing to stay, a suit pending before it.

Quære whether any appeal lies at all.

Two suits for profits were brought by the same plaintiff
against the same defendant in the Revenue Courts, one in the
district of Meerut, the other in the district of Bulandshahr.
During the pendency of the suits it was alleged that the matters
in dispute had been referred to arbitration. Applications were
made in both Courts to stay the suit pending the arbitration,
under schedule II, paragraph 18, of the Code of Civil Procedure.
The Meerut court granted a stay; but the Bulandshahr court
rejected the application. The plaintiff appealed to the High
Court against the order of the Meerut Court, and the defendant
appealed against the order of the Bulandshahr Court. When the
appeals came on for hearing a preliminary objection was taken to
the effect that no appeal lay in either case.

Dr. Surendra Nath Sen, for the appellant

Mr. Nihal Chand, for the respondent.

RICHARDS, C. J., and BANERJI, J. :—This and the connected
appeal No. 18 of 1917 arise out of two suits which were
instituted in the Revenue Court by the same plaintiff against
the same defendant. The suits were suits for profits. The
amounts in dispute were such that if decrees had been made
appeals would have lain to the Civil Court. During the
pendency of the suits it is alleged that the matters in dispute
were referred to arbitration. One of the suits was pending in
the Revenue Court at Meerut and the other suit was pending in
the Revenue Court at Bulandshahr. An application was made
by the defendant at Meerut to stay the suit pending the arbitration
under schedule II, paragraph 18, of the Code of Civil Procedure.

* First Appeal No 42 of 1917, from an order of Jai Narain, Assistant
Collector, first class, of Meerut, dated the 17th of July, 1917.

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The Meerut court granted a stay. An exactly similar application was made to the Bulandshahr Revenue Court. That court took an exactly opposite view to that taken by the Meerut court and refused to stay the suit. This was a most unfortunate situation for all concerned, and will work great hardship and tend to prolong a useless litigation. The plaintiff appealed against the decision of the Meerut court whilst the defendant appealed against the decision of the Bulandshahr court. The defendant raises a preliminary objection against the plaintiff's appeal that no appeal lies. In the connected appeal an exactly similar preliminary objection is taken by the plaintiff. We think that the preliminary objection has force. Section 175 of the Tenancy Act expressly provides that no appeal shall lie from any decree or order passed by any court under this Act except as thereafter provided. This section obviously applies to all appeals, whether they be appeals to the Revenue Court itself or to the Civil Court. Section 177 deals with appeals which lie to the Civil Court and a right of appeal is only given against a "decree" and then only in certain class of cases. No appeal is given against an order. It seems to us clear that neither the order staying the suit in the Revenue Court at Meerut nor the order refusing to stay the suit in Bulandshahr is a "decree" within the meaning of section 177. It is contended on behalf of the appellant that section 193 of the Tenancy Act incorporates the Code of Civil Procedure and in the present Code of Civil Procedure it is provided that an appeal shall lie against an order staying or refusing to stay proceedings (Schedule II, paragraph 18). We do not think that this argument has force. At most it would mean that by incorporating the Code of Civil Procedure an appeal is given in the Revenue Court. It certainly cannot mean that an appeal is given to the Civil Court. We have been invited to say whether or not an appeal lies in the Revenue Court. We do not think that this Court ought to take upon itself to decide this matter, which is not before it; if we did decide the matter the Revenue Court would not be bound by our decision. The result is that we allow the preliminary objection and dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

EMPEROR v. CHHOTE LAL *

1917
November, 8.

Act No. XLV of 1860 (Indian Penal Codes), section 441—Criminal trespass—Necessary constituents of offence.

Where a person is found in the house of another in circumstances which would *prima facie* indicate that the offence of criminal trespass as defined in section 441 of the Indian Penal Code had been committed, and sets up the defence that he did not enter the house with any of the intents referred to in the section, but in pursuance of an intrigue with a female living there it is the duty of the trying court to give accused an opportunity of substantiating such defence.

If the accused succeeds in showing that his presence in the house was in consequence of an invitation from or by the connivance of a female living in the house with whom he was carrying on an intrigue, and that he desired that his presence there should not be known to the person in possession, then he cannot be convicted of criminal trespass.

If, however, it is shown that the person in possession of the house has expressly prohibited the accused from coming to the house, an intent to annoy may be legitimately inferred.

The following cases were referred to:—*Balmakand Ram v Ghansamiam* (1), *Premamundo Shaha v. Bindabun Chung* (2), *Empero v Lakshman Raghunath* (3), *Empero v Mulla* (4) *Empero v Gaya Bhar* (5)

In this case one Chhote Lal was tried summarily by a first-class Magistrate of the Banda district. The offence alleged was that of lurking house-trespass by night, and it is clear from the record that the prosecution led evidence to prove, not merely that the house of the complainant was entered by Chhote Lal under circumstances covered by the definition in section 443 of the Indian Penal Code, but also that the lurking house-trespass in question was committed with intent to commit theft. The accused in his defence admitted having been caught at night inside the house of the complainant Badri under the circumstances deposed to by the prosecution witnesses. He suggested that those witnesses were not speaking the truth with regard to his having stolen or attempted to steal any of Badri's property. He pleaded that his intention in effecting a secret entry into Badri's

* Criminal Reference No. 752 of 1917

(1) (1894) I. L. R., 22 Cal., 391 (3) (1902) I. L. R., 26 Bom., 553.

(2) (1895) I. L. R., 22 Cal., 994 (4) (1915) I. L. R., 37 All., 395.

(5) (1916) I. L. R., 38 All., 517.

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house had been to carry on an intrigue with the widowed mother of the said Badri. He pleaded, further, that he had entered the house at the express invitation of this woman. The trying Magistrate refused to inquire fully into the facts. He left it uncertain whether there was any truth in the defence above set out. He said that, even on the accused's own statement of the facts, an offence, namely, the offence of lurking house-trespass by night, punishable under section 456 of the Indian Penal Code, was established. He convicted and sentenced Chhote Lal accordingly.

The District Magistrate of Banda, not being satisfied with the propriety of the conviction, referred the case to the High Court.

The parties were not represented

PIGGOTT, J.—This is a reference by the District Magistrate of Banda in a case in which one Chhote Lal was tried summarily by a first-class Magistrate of that district. The offence alleged was that of lurking house-trespass by night, and it is clear from the record that the prosecution led evidence to prove, not merely that the house of the complainant was entered by Chhote Lal under circumstances covered by the definition in section 443 of the Indian Penal Code, but also that the lurking house-trespass in question was committed with intent to commit theft. The accused in his defence admitted having been caught at night inside the house of the complainant Badri under the circumstances deposed to by the prosecution witnesses. He suggested that those witnesses were not speaking the truth with regard to his having stolen or attempted to steal any of Badri's property. He pleaded that his intention in effecting a secret entry into Badri's house had been to carry on an intrigue with the widowed mother of the said Badri. He pleaded, further, that he had entered the house at the express invitation of this woman. The trying Magistrate refused to inquire fully into the facts. He has left it uncertain whether there was any truth in the defence above set out. He says that, even on the accused's own statement of the facts, an offence, namely, the offence of lurking house-trespass by night, punishable under section 456 of the Indian Penal Code, was established. He convicted and sentenced Chhote Lal accordingly. The District Magistrate, in referring the case, has relied upon the reported

decision of a Judge of this Court in the case of *Emperor v Gaya Bhar* (1). It has been suggested that this decision is inconsistent with that of another Judge of this Court in the case of *Emperor v. Mulla* (2). In our opinion the two decisions are not inconsistent and we agree substantially with both of them. When the evidence shows that a man has been found lurking at night inside the house of another person, a perfect stranger to him, or a person in whose house he has no apparent business, the prosecution will be entitled to ask the court to infer from these facts that there was a guilty intention on the part of the accused sufficient to bring his action within the purview of section 441 of the Indian Penal Code. This was clearly laid down in the case of *Balmakand Ram v. Ghansamram* (3), and also in the case of *Premanundo Shaha v. Brindabun Chung* (4), at page 994 of the same volume. And in dealing with cases of this sort we may remark that Magistrates should not overlook the existence of section 509 of the Indian Penal Code when they are considering the allegation on the part of the prosecution that the entry by the accused into the premises in question must, presumably, have been with intent to commit some offence. Difficulties are only likely to arise when the accused himself pleads in his defence and establishes, either by direct evidence, or by way of reasonable inference from proved facts, that he had some specific intention in entering the house, and that the intention in question was neither to commit an offence nor to intimidate, insult or annoy any person in possession of the house. The provisions of section 106 of the Indian Evidence Act (Act I of 1872) may also be referred to in this connection. In the case now before us the accused alleged two things: firstly that he had entered the house at the request of one of its inmates, and, secondly, that he had no intention of insulting or annoying the complainant Badri. Presumably it might be suggested in his defence that this latter plea was sufficiently established by the precautions taken by him to conceal from Badri the fact of his presence in the house. At any rate it was clearly no part of the case for the prosecution that Badri knew of the existence of any intrigue between the accused Chhote

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(1) (1916) I L. R., 38 All., 517. (3) (1894) I. L. R., 22 Cal., 391.

(2) (1915) I. L. R., 37 All., 395. (4) (1895) I. L. R., 22 Cal., 994.

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Lal and his mother, or had ever forbidden Chhote Lal's access to his house on the ground of his knowing or suspecting the existence of such intrigue. We make these remarks because we think it possible that the decision of the learned Judge of this Court in the case *Emperor v. Gaya Bhar* (1), may be interpreted too widely and may be held to apply to cases in which an accused person has forcibly or clandestinely entered a house which he knew to have been definitely closed and barred against him by the owner thereof. In such cases it might not be a sufficient answer to a charge of criminal trespass for the accused to say that he personally hoped that the owner would remain in ignorance of the fact of his entry. The court may find on the facts that the intention to insult or annoy, under such circumstances, was so clearly inherent in the acts of the accused as to form an essential part of the purpose with which entry into the house was effected. On this point the remarks of the learned Judges of the Bombay High Court in the case of *Emperor v. Lakshman Raghunath* (2), are certainly pertinent. In our opinion there should have been a further inquiry into this case before the accused was either convicted or acquitted. He was himself anxious to summon the complainant's mother as his witness, and the trying Magistrate has given no valid reasons for refusing that request. It may be that this woman's evidence would have entirely satisfied the Magistrate as to the facts of the case, or the Magistrate may come to the conclusion that the allegations made by the accused in his defence are wholly false and that he has aggravated his position by putting forward these allegations and dragging a respectable woman into court on the strength of them. On the other hand, if the Magistrate finds the facts to be as alleged by the accused, the case should be decided on the principles of law laid down in the rulings to which we have referred, including the decision of this Court in the case of *Emperor v. Gaya Bhar* (1), from which, if the principles laid down are properly limited and understood, we see no reason to dissent. We set aside the conviction and sentence in this case, but we do not acquit the accused Chhote Lal of the offence charged. On the contrary we direct the Magistrate to proceed with the trial,

(1) (1916) I. L. R., 38 All., 517. (2) (1902) I. L. R., 26 Bom., 558.

to inquire into the truth or otherwise of the defence set up and to pass such orders in the case as appear to him correct and appropriate.

WALSH, J.—I agree. What I propose to say on the question of law referred to us, covers this case and also Criminal Reference No. 837 of 1917 before us for orders. I think it is a question of fact in each case. As Lord JUSTICE BOWEN once said, “the state of a man’s intention is as much a question of fact as the state of his digestion” and the real question of law is whether, when there has been a conviction, there is any evidence of intention justifying the conviction. There is no conflict between the reported cases, and I venture to sum up the result of them in this way. They come to this, that if there is an invitation, or complicity by the woman, combined with an intention to preserve strict secrecy, then it is difficult to say that there is any intention to annoy a third person, but if that third person has expressly prohibited the accused, then his act becomes a direct defiance of an express order, and it is impossible to say that you cannot infer from it an intention to annoy the author of the order. I think this is what has already been established by the decided cases. I agree with the decision of Mr Justice KNOX in *Emperor v. Mulla* (1), that a man found inside the complainant’s house who makes no statement of his reasons for being there or gives an explanation which is demonstrably false, is clearly liable to be convicted, on the ground that the burden of proof lies upon him and he has not discharged it. I do not understand that Mr. Justice SUNDAR LAL differed from that decision. On the contrary he seems to have agreed with it. Mr. Justice SUNDAR LAL held, in *Emperor v. Gaya Bhar* (2), that mere knowledge, on the part of the accused, that he is likely to cause annoyance is not sufficient, and in coming to that conclusion he merely followed the case of *Queen Empress v. Rayapadayachi* (3), where it was held that although a man may know that his act is likely to cause annoyance it does not necessarily follow that he does the act with intent to annoy. And, so far, I think Mr Justice SUNDAR LAL and the Madras High Court were really giving effect to the

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(1) (1915) I. L. R., 37 ALL., 395. (2) (1916) I. L. R., 38 ALL., 517.

(3) (1896) I. L. R., 19 Mad., 240.

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absence from this section (section 441) of the words found in a cognate section, namely, section 297, where the knowledge that the feelings of a person are likely to be wounded, is one of the ingredients of the offence. This view is borne out by the decision in *Emperor v. Lakshman Raghunath* (1), to which my brother PIGGOTT has already referred. In that case there was a distinct prohibition. The accused only wanted to get at their judgement-debtor and trespassed upon the complainant's house in order to do it. Some people might be annoyed by that, while some people might not mind it, and an enemy of the judgement debtor certainly would not. But in the particular case the complainant forbade them to do it, and it was held, and I agree with the decision, that, in the face of his order directly forbidding them, an offence was committed within this section. There is a passage in that judgement, which I adopt :—" When it is uncertain whether a particular result will follow (as in the Madras case in which the accused hoped to keep his conduct secret), there may be no intent to cause that result even though it may be known that the result is likely. But it seems impossible to contend, when an act is done with a knowledge amounting to practical certainty that a result will follow, that it is not intended to cause that result." Regard must, obviously, be had to all the circumstances of the case. It may sometimes happen, I suppose, in this country as in others, that a man who is making love to another man's wife is doing it not merely with the tacit approval of the husband but as the result of a conspiracy, if I may use the word, between the husband and the wife to enable the wife to get away from the husband, and find a protector. Such cases are not unknown. In such a case the man might not know that his visits were approved by the husband and might think that he was successfully carrying on a secret intrigue, the truth being that the husband was assisting the wife all the time. I take it that no court ought to find, if those facts were established, and although the man complained against himself might have thought that his conduct was likely to annoy, that he had any intention of annoying the husband. I agree with the view taken by the learned Sessions Judge of Cawnpore in the case which is before us, Revision No. 837 of 1917,

(1) (1902) I, L. R., 26 Bom., 558.

*Lala v Emperor**, that if the accused knew that he had been expressly prohibited from entering the house by the uncle it is legitimate to infer that he intended to annoy by persisting. Another example is that of a son in disgrace who persists in entering his father's house after a direct prohibition. I think this feature of the case in Reference No. 837 of 1917 just marks the dividing line between the two cases. I entirely agree with the order proposed in the case before us. The facts must be ascertained before the final decision can be arrived at.

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Conviction quashed.

* In the case referred to the following judgement was delivered:—

PIGGOTT and WALSH, JJ.:—This is a case in which a conviction of lurking house-trespass by night (section 456 of the Indian Penal Code) has been recorded by the trying Magistrate and has been confirmed by the Sessions Judge on appeal. The case has come before us in revision, substantially upon the pleading that on the view of the facts taken by the learned Sessions Judge the latter ought to have held that no offence had been proved. One difficulty we must necessarily feel in dealing with the case on these lines is that the learned Sessions Judge has not definitely found the facts to be in accordance with the argument addressed to us in support of this application. The facts in question were not alleged by the accused himself, but certain circumstances suggesting the possibility of their existence were deposed to by some of the witnesses called for the defence. The learned Sessions Judge has in effect said that, even supposing the facts to be as now suggested on behalf of the accused, the conviction must be upheld. In substance the case before us is really governed by the decision of this Court in the case of *Emperor v. Mulla*, (1915) 1 L. R., 37 All., 395, and might well have been affirmed on those grounds. Apart from this, we have just been considering in connection with Criminal Reference No. 752 of 1917 the question of law which has been discussed in connection with the present application, and we need only say that we think the conviction in the present case could be justified along the line of argument followed by the learned Sessions Judge. In saying this we are by no means admitting the facts to be as suggested on behalf of the accused. It would be unfair to do so in the face of the express denial of those facts by Musammat Bhagia (the young woman principally concerned) in the evidence given by her before the Court. We dismiss the application and confirm the conviction and sentence passed by the Magistrate. The accused must surrender to his bail to undergo the unexpired portion of sentence.

APPELLATE CIVIL.

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Before Mr. Justice Piggott and Mr. Justice Walsh
HABIB-ULLAH (PLAINTIFF) v MANRUP AND OTHERS (DEFENDANTS)*
Occupancy tenant—Mortgage of part of occupancy holding—Subsequent lease of same while mortgage was yet unregistered—Rights of mortgagee, and lessee.

An occupancy tenant made a usufructuary mortgage of certain plots of land comprised in his occupancy holding. He apparently gave the mortgagees possession, but refused to get the mortgage deed registered and in consequence the mortgagees were obliged to bring a suit to compel registration. Whilst this suit was pending, the occupancy tenant leased certain plots covered by the mortgage at a yearly rent for a period of five years.

Held, on suit by the lessee for possession, that the plaintiff was entitled to a decree, and that he was not bound as a condition precedent, to pay off the mortgagees. *Bahoran Upadhyay v Uttamgar* (1) referred to.

THE facts of this case are set forth in the following referring order of RAIQ, J:—

The facts which have given rise to this appeal are stated in my order of remand, dated the 13th of April, 1917, but in order to make the present judgement intelligible I propose to recite some of the salient features of the case. It appears that defendant No. 5 has an occupancy holding. He executed two mortgage deeds of the said holding on the 7th of July, 1914, in favour of defendants Nos. 1 to 4. He, however, denied execution of the deeds before the Sub-Registrar, and the mortgagees brought a regular suit for compulsory registration. Before the conclusion of the suit for compulsory registration, the defendant No. 5, on the 10th of August, 1914, executed a lease of the same occupancy holding which he had mortgaged to the defendants Nos. 1—4 in favour of the plaintiff appellant for five years. Subsequent to the execution of the lease the defendant No. 5 entered into a compromise with the mortgagees and agreed to have the deeds of mortgage registered. The deeds were accordingly registered on the 13th of July, 1915. It should be noted here that the mortgagees obtained possession of the occupancy holding from the date of

* Second Appeal No. 1576 of 1915, from a decree of Durga Dat Joshi, District Judge of Azamgarh, dated the 9th of September, 1915, reversing a decree of Ramoshwar Dayal Sharma, First Additional Munsif of Azamgarh, dated the 30th of July, 1915.

(1) (1911) I.L.R., 38 All, 779.

their mortgages and have remained in possession ever since. On the 26th of October, 1915, the lessee brought the suit out of which this appeal has arisen for possession of the occupancy holding on the basis of his lease. He impleaded in the case, as defendants, his lessor and the four mortgagees. Various defences were urged in bar of the claim. The court of first instance decreed the claim holding that the mortgages were collusive. The claim of the plaintiff for damages was dismissed. He preferred an appeal from the decree dismissing his suit for damages while the mortgagees preferred an appeal from the decree awarding possession to the lessee. The learned Judge who heard the appeals did not consider the question of collusion between the defendant No. 5 and defendants Nos. 1-4, that is, between the mortgagor and the mortgagees. He decided the appeals on another point. He held that if the lessor himself could not recover possession from the mortgagees without paying the mortgage money, though the mortgages were invalid at law, the lessee who claimed through him could not be in a better position. The lessee, therefore, could not get possession without paying off the mortgages. The appeal of the mortgagees was allowed and the claim of the lessee was accordingly dismissed both for possession and damages.

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The lessee, who is the plaintiff in the case, has come up in second appeal to this Court, and has preferred two appeals, one from the decree in the appeal of the mortgagees and the other from the decree in his own appeal before the lower appellate court. I remanded the case at the last hearing to the lower appellate court for the trial of the issue relating to the alleged collusion between the mortgagor and the mortgagees. The learned Judge has returned a finding to the effect that no collusion has been proved. The finding is one of fact and it must be accepted. The plaintiff appellant, however, contends that he ought to succeed on the ground of his having a legal title as against the mortgagees. It is said that the mortgages to the defendants Nos. 1-4 are admittedly invalid at law, while the lease in his favour is admittedly legal and open to no objection on any legal ground. The case relied upon by the court below is one that was between the mortgagor and the mortgagees. It was held in

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that case that one who seeks equity must do equity. The mortgagor, having taken the money of the mortgagees and delivered the possession of the occupancy holding to the latter, could not equitably demand return of possession on the ground that the mortgage was invalid without paying off the money. Both the parties had entered into a contract knowing it to be invalid and both of them were equally wrong, and if the mortgagor derived any benefit from the money raised on the mortgage it was but equitable that he should be made to return the money before getting back his property. Those considerations, it is argued, do not apply to the present case. The plaintiff who is the lessee has a perfectly valid title at law, while the mortgagees have no such title. The plaintiff's position is such that he is not called upon to do any equity to the mortgagees before he can enforce his lease. For the mortgagees the reply is that the plaintiff knew perfectly well of the existence of the mortgages because his father had attested one of the mortgage-deeds. If the contention of the lessee is allowed, all that the holder of an occupancy tenancy has to do is to execute a mortgage, deliver possession to the mortgagee and the next day give a lease for consideration to a third party and thus deprive the mortgagee of his mortgage money. The lessee need not be necessarily cognizant of the mortgage executed by his lessor. Both the lessee and the mortgagee derive their title from the occupancy tenant, and what the latter himself could not do his lessee ought not to be allowed to do. There is no case law on the point, at least none has been cited at the Bar. I have no doubt that, whichever way I decide, the losing party is bound to go up in Letters Patent Appeal. The point is one which will probably arise in future in other cases also, and in order to set it at rest once for all, I think it desirable to refer the case to a bench of two Judges, and I do so.

Babu *Piari Lal Banerji* (with him Mr. *R. Malcomson*) for the appellant:—

The plaintiff has not received any portion of the mortgage money, by payment of which the mortgagees got possession. He has derived no benefit under the mortgage transaction. As between him and the mortgagees there are no benefits to be returned, and so no equities in favour of the latter against the

former. The equities being equal, the law must prevail, and the legal estate is with the plaintiff, the transfer to him being valid and the mortgage being invalid. The present point did not arise in the case relied on by the lower court, namely, the case of *Bahoran Upadhya v Uttamgir* (1). There it was the mortgagor himself who came forward to recover possession, and the court held that he must refund the benefit first. The ruling in the case of *Chhiddu v Sheo Mangal Singh* (2) is not applicable to the present case. There the plaintiff, zamindar, was aware of the existence of the mortgage. In the present case it has not been proved that the plaintiff had acted in bad faith or in collusion with the mortgagor in order to defraud the mortgagees. It is not proved that he had any knowledge of the existence of the mortgage. The fact that the plaintiff's father was an attesting witness of the mortgage deed proves nothing; mere attestation of a deed is no notice of its contents; *Nand Lal v. Jagat Kishore* (3). There is no reason why the plaintiff should be called upon to pay the mortgage money. If a person transfers property by a deed which is imperfect and then transfers it to another by a deed which is perfect and the second transferee sues the first for possession, it is not open to the latter to plead that he shall first be repaid the money which he had paid to the transferor. Similarly where there are two deeds, one of which is unregistered and the other registered, the holder of the registered deed can always succeed on the strength of his title and is never made to pay the consideration advanced by the holder of the unregistered deed.

Mr. S. M. Yusuf Hasan, for the respondents :—

If the mortgagor himself had been suing for recovery of possession he would undoubtedly not be given a decree for dispossessing the mortgagees except on repayment to them of the money which they had advanced. His lessor who derives title from him can have no higher rights. To give the plaintiff a decree for possession without requiring him to redeem the mortgages would be to allow the mortgagor in a round about way to defraud the mortgagees, which he would not be allowed to do if

(1) (1911) I.L.R., 38 All., 579. (2) (1916) I.L.R., 39 All., 186.

(3) (1916) 14 A.L.J., 1108 (1118).

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he himself came into court. The lease is an obvious dodge to defraud the mortgagees; the fact that it was given while the mortgagees were in possession shows that the mortgagor was acting dishonestly. The mortgagees' possession was sufficient notice to the lessees. Equity demands at any rate that the lease should be transferred to the mortgagees until their money is repaid.

Babu *Piari Lal Banerji*, was not heard in reply.

PIGGOTT and WALSH, JJ. :—The essential facts out of which these two appeals arise are as follows :—One Mahadeo, an occupancy tenant, executed, on the 7th of July, 1914, three mortgage-deeds, one in favour of Sarup and Manrup and the other two in favour of Ram Jas and Ram Phal. The deeds in question purported to give the aforesaid mortgagees possession of plots of land forming part of Mahadeo's occupancy holding. One plot was given in the first mentioned mortgage and six more plots were added in the other two. After executing these documents Mahadeo refused to get them registered, and eventually the mortgagees were driven to institute a regular suit in order to obtain registration. When this suit was instituted Mahadeo declined to contest it, and it was decreed against him on his own confession, so that registration was at last effected in the month of July, 1915, almost one year after execution. We must take it, however, on the findings of the courts below, that possession had at once been given to the mortgagees of the plots specified in their mortgages. In the meantime, that is to say, on the 10th of August, 1914, before the suit by the mortgagees had been instituted and while the question of registration was still pending before the District Registrar, Mahadeo executed another deed by which he purported to lease 20 plots of land, including the six plots specified in the mortgages in favour of Ram Jas and Ram Phal, but not including plot No. 859 specified in the mortgage in favour of Sarup and Manrup, to the plaintiff Habib-ullah at a yearly rent. Habib-ullah failed to obtain possession, and thereupon brought the present suit, impleading as defendants the four mortgagees, the tenant Mahadeo and one Debi Din, with whose position we are not now concerned. It would seem that in the courts below it was not noticed that the plaintiff's claim did not include plot No. 859, and that the mortgages in favour of Ram Jas and Ram Phal

only affected six out of the 20 plots specified in the plaint. The case was contested as if the area affected by the mortgages and by the lease were identical. The court of first instance held that the mortgages, being mortgages of an occupancy holding, were contrary to the express provisions of the Tenancy Act and conferred no title on the mortgagees. The lease in favour of the plaintiff Habib-ullah, on the other hand, was a valid contract of lease for a period of five years, permissible under the provisions of the Act. The learned Munsif, therefore, held that the plaintiff had a good title to possession over the land in suit as against all the defendants, subject only to the framing of the decree in such a form as to safeguard the rights of the additional defendant Debi Din. With this qualification the court of first instance overruled all the objections taken by the mortgagees and decreed the plaintiff's claim. There was an additional claim for damages, based upon allegations of fact which the learned Munsif found not to be substantiated by the plaintiff's evidence, and this part of the claim was, therefore, dismissed. There were two appeals to the District Judge, one by the plaintiff against the order dismissing his claim for damages and the other by the mortgagee-defendants against the decree awarding possession to the plaintiff. The learned District Judge, referring to the decision of a Bench of this Court in *Bahoran Upadhya v. Uttam-gir* (1), has held that the plaintiff is not entitled to recover possession without refunding the mortgage-money, and he has accordingly dismissed the plaintiff's claim altogether. On this view of the case the appeal filed in the court below by the mortgagees was allowed and the cross-appeal of the plaintiff was dismissed. Hence there are two appeals now before us, both brought by the plaintiff against the two decrees passed by the lower appellate court. The learned Judge of this Court before whom the matter first came found it necessary to remit certain issues for determination by the court below and afterwards referred the appeal to a Bench of two Judges for consideration of the question of law involved. In our opinion the facts of the case are not covered by the ruling upon which the learned District Judge has relied. The plaintiff accepted his lease after the

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execution of the three mortgages in question, but before their registration, and it is certainly not proved by any evidence on the record that he had notice of the existence of these mortgages, much less that he was acting fraudulently or in collusion with the occupancy tenant in order to defeat the rights of the mortgagees. Something has been made in argument of the fact that the plaintiff's father witnessed the execution of one of the mortgage deeds, but, after considering the evidence given by this man Faqire in the trial court, we are satisfied that it is not proved that Faqire knew that the land comprised in the mortgage-deed which he witnessed was also included in the lease afterwards taken by his son, Habib-ullah. Under these circumstances it seems to us that Habib-ullah is as much entitled to maintain the present suit for recovery of possession as lessee under the terms of the contract in his favour, as he would have been to maintain a suit against a rival lessee, that is to say, against a person to whom Mahadeo had also granted a lease of a portion of the same land, in respect of which it could be contended that it was not binding on Habib-ul-lah either because it was subsequent in date or because it was for some other reason invalid in law. The equitable principle upon which the case of *Bahoran Upadhya v Uttamgir* (1) was decided does not seem to us to affect a *bond fide* transferee from the occupancy tenant. If the mortgagees have any remedy, it is as against Mahadeo.

The appeal before us challenges the decision of the court of first instance on the question of damages. This matter has not been adequately gone into on the facts by the lower appellate court, but we are content to say that no sufficient cause has been shown to us for dissenting from the finding on the strength of which this part of the plaintiff's claim was dismissed by the court of first instance. The arguments before us have proceeded on the assumption that the plaintiff has not hitherto succeeded in obtaining possession under his lease and that his allegations to the contrary in his plaint were not well founded. On this basis the claim for damages as brought must be dismissed, but otherwise we are of opinion that the decrees of the lower appellate court must be set aside and decrees of the court of first

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instance restored. The respondents will pay the costs in this and in the lower appellate court.

Appeal allowed.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

AHMAD KHAN AND OTHERS (OBJECTORS) v. MUSAMMAT GAURA
(APPLICANT).*

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 181—Mortgage—Suit for sale—Application for final decree—Limitation.

An application for a final decree in a suit for sale on a mortgage being an application in the suit and not an application in execution, the fact that one such application has been made within the prescribed period of limitation does not operate to extend the period of limitation in favour of a second application, the first having been dismissed for default.

THE facts of this case were as follows:—

The respondent obtained a preliminary decree for sale on the 27th of August, 1908. She applied for a final decree on the 26th of August, 1911, but the application was dismissed for default of both parties on the 9th of April, 1912. The respondent again applied for a final decree on the 10th of September, 1912. This application was resisted on the grounds that after the dismissal of the previous application the present application was not maintainable and that it was barred by time. The first court held that the proper remedy of the respondent was to apply for the revival of the previous application and that the subsequent application was not maintainable. The lower appellate court reversed the decision of the first court and remanded the case for proceeding with the application. The judgement-debtors appealed to the High Court.

Maulvi *Iqbal Ahmad*, for the appellants:—

When the first application was dismissed for default, the proper remedy of the decree-holder was either to appeal against the order of dismissal or to apply under order IX, rule 9, of the Code of Civil Procedure for an order setting aside the dismissal. The present application is neither in form nor in substance an application under order IX, rule 9, and was presented long after the period prescribed for such an application by article 163 of the

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*First Appeal No. 72 of 1917, from an order of *Sulreshan Dayal*, Second Additional Subordinate Judge of Jaunpur, dated the 20th of March, 1917.

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Limitation Act had expired. The present application, therefore, cannot be treated as an application for the revival of the former application. Even assuming that the application is maintainable, it is barred by time. The present Code of Civil Procedure makes it clear that an application for a final decree is not an application in execution of a decree but an application in the suit itself. Therefore article 182 of the Limitation Act is not applicable to the case, and the previous application made by the respondent cannot give a fresh start to the period of limitation. The present application is governed by article 181. As it was made more than three years after the expiry of the time for payment fixed by the preliminary decree it is barred by time.

Dr. S. M. Sulaiman, for the respondent :—

No appeal lies from the order of remand passed by the lower appellate court in this case. Every order of remand sending a case back for trial on the merits is not necessarily appealable; *Wahid-un-nissa v. Kundan Lal* (1). In the present case the order of remand having been made in an appeal from an order and not from a decree, no further appeal lies to the High Court. The present application is maintainable. The order of dismissal of the previous application was made because of the non-appearance of both parties; it was an order under rule 3 and not rule 8 of order IX, Civil Procedure Code. In such a case a fresh application is maintainable. The question of limitation has not yet been decided by the courts below; it will be one of the questions for determination by the lower court when the case goes back in accordance with the order of remand. The period of three years should be calculated from the date of the dismissal of the previous application, and not from the date of the expiry of the time fixed for payment.

Maulvi *Iqbal Ahmad*, was not heard in reply.

RICHARDS, C. J., and BANERJI, J.:—This appeal arises out of an application for a final decree in a mortgage suit. The preliminary decree was passed on the 27th of August, 1908, and six months were allowed to the defendant to pay the mortgage-money. It is stated in the petition filed by the decree-holder that no payment was made. He made an application on the 26th

of August, 1911, for a final decree under order XXXIV, rule 5. That application was dismissed for default on the 9th of April, 1912. On the 10th of September, 1912, the present application was made for a final decree. It was opposed on two grounds, first, that the order dismissing the previous application was a bar to the present application and, secondly, that the application was time-barred. The court of first instance allowed the first objection and did not decide the second. It dismissed the application now made. Upon appeal the lower appellate court disagreed with the court of first instance and remanded the case for proceeding with the application.

So far as the first point is concerned the defendant's objection was without force, because, the first application having been dismissed for default of appearance of both parties, a fresh application could be made, but this second application ought to have been made within the period prescribed by the law of limitation. It is clear that the application was beyond time. The period of limitation which governs a case of this kind is three years, under article 181 of the first schedule to the Limitation Act, from the date on which the right to apply accrued, that is, from the expiration of the time allowed by the decree for payment of the mortgage money. In the present case the six months expired on the 27th of February, 1909, and as the present application was made on the 10th of September, 1912, it was clearly beyond time. The court below seems to have overlooked the fact that in the present Code of Civil Procedure a "final decree" in a mortgage suit is a decree in the suit itself and an application for a final decree cannot be deemed to be an application in execution. The second application cannot be regarded as a revival of an application which was disposed of. In this view the present application was clearly beyond time and ought to have been dismissed.

We accordingly allow the appeal, set aside the order of the court below and restore the order of the court of first instance with costs in all courts.

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Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerjee.

FAZL AHMAD AND ANOTHER (DEFENDANTS) *v.* RAHIM BIBI (PLAINTIFF)
AND QAMR-UN-NISSA BIBI AND OTHERS (DEFENDANTS).*

*Muhammadan law—Gift made during his last illness, by a son to his mother—
Marz ul-maut—Application of doctrine.*

On a question of the application of the doctrine of *marz-ul-maut* to a disposition of property made by a Muhammadan during his last illness, if the transaction is a sale the doctrine would not apply at all; if the transaction is a waqf, it would be valid to the extent of one third; while if it is a gift, it would not be valid at all.

In the case before the Court the particular transaction was held on the facts to be really a gift to one of the heirs (the mother of the donor) and therefore invalid, although in form it purported to be a sale.

THIS appeal arose out of a suit for possession of certain shares in the estate of a deceased Muhammadan, Manzur Ahmad. The deceased had died childless, leaving as his heirs his uncle Fazl Ahmad, his mother Musammat Rahim Bibi, and two widows, Musammat Qamr-un-nissa and Musammat Jilani Begam, the latter being a daughter of Fazl Ahmad. Shortly before his death, and during his last illness, which was of some duration, Manzur Ahmad, who was a man of considerable means, transferred to his mother Musammat Rahim Bibi two villages valued at a about a lakh each and a sum in cash amounting to Rs. 85,000 odd. After the death of Manzur Ahmad, there was litigation in the Revenue Court as to mutation of names with respect of the two villages referred to above, and Fazl Ahmad succeeded in getting his name recorded as one of the heirs of Manzur Ahmad, and was appointed *lambardar*. Thereafter the present suit was filed by Musammat Rahim Bibi to recover possession of the two villages, Bithaura Kalan and Amkhera, which had been transferred to her by Manzur Ahmad; and Fazl Ahmad filed another suit claiming his share of the cash given to Rahim Bibi by Manzur Ahmad on his death-bed. In the suit brought by Rahim Bibi the Subordinate Judge decreed the plaintiff's claim for possession and mesne profits.

The defendants thereupon appealed to the High Court.

Mr. B. E. O'Connor, the Hon'ble Sir Sundar Lal and Dr. S. M. Sulaiman, for the appellants.

* First Appeal No 21 of 1916, from a decree of Gauri Shankar, Subordinate Judge of Pilibhit, dated the 4th of January, 1916.

The Hon'ble Dr. *Tej Bahadur Sapru*, Babu *Preo Nath Banerji* and Maulvi *Iqbal Ahmad*, for the respondents.

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RICHARDS, C J., and BANERJI, J.:—This and the connected appeals arise out of two suits which related to certain property, movable and immovable, which belonged to one Manzur Ahmad, who died on the 2nd of September, 1912. Manzur Ahmad, although he had been married (four times, it is stated) never had any children. His heirs were, first, Fazl Ahmad (his paternal uncle), secondly, his mother Musammat Rahim Bibi, and thirdly his two widows Musammat Qamr-un-nissa and Musammat Jilani Begam. Under the Muhammadan Law of Inheritance, Fazl Ahmad would have been entitled to 10 *sihams* out of 24, Rahim Bibi to 8 *sihams*, and the two widows to 6 *sihams* between them. Fazl Ahmad was not only uncle to the deceased, but he was also the father of Musammat Jilani Begam, his youngest wife. Before his death Manzur Ahmad was possessed of a considerable amount of property. He had deposited in the house of Lala Khub Chand (banker) the sum of Rs. 16,876. He had also in cash in his house the sum of Rs. 8,500 and 4,000 sovereigns, (equal to Rs. 60,000) which was buried in a house which was occupied by Jilani Begam. He had also Rs. 58,000 on fixed deposit with the Allahabad Bank. Besides this cash, the deceased was possessed of some house property and a considerable amount of zamindari property, including two villages called Mauza Bithaura Kalan and Mauza Amkhera. These two villages were worth about two lakhs of rupees. The property of the deceased was worth probably between 5 and 6 lakhs (if jewellery, ornaments etc., be included).

Very shortly before his death Manzur Ahmad had transferred the two last mentioned villages to his mother Musammat Rahim Bibi. He had also given her the 4,000 sovereigns. He caused the Rs. 16,876 deposited with Lala Khub Chand to be transferred to her name. The Rs. 8,500 in cash had also been brought to the house of Lala Khub Chand and placed to the credit of Musammat Rahim Bibi. It thus appears that the deceased transferred, very shortly before his death, property and money to the extent of Rs. 2,85,376.

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After the death of Manzur Ahmad there was litigation in the Revenue Court as to mutation of names with regard to the two villages to which we have referred, with the result that Fazl Ahmad succeeded in having his name recorded as one of the heirs of Manzur Ahmad, and he was appointed lambardar. This suit was thereupon instituted in the Civil Court and Musammat Rahim Bibi claims against the other heirs that she is entitled to the villages by virtue of the deed, dated the 29th of August, 1912. In the other suit Fazl Ahmad is plaintiff and seeks therein (amongst other things) his share of the four thousand sovereigns, of Rs. 16,876 and of Rs. 8,500.

The defendants in the suit brought by Rahim Bibi pleaded (1) that Manzur Ahmad was so ill that he knew nothing about the transfer at all, (2) that if he was capable of understanding the transaction it was in truth and fact a gift, and that the gift, being to an heir, was invalid having regard to the Muhammadan law of *marz-ul-maut*. Rahim Bibi answered these pleas by contending (1) that the transaction was not a gift, but a sale, in which case *marz-ul-maut* did not apply, (2) that having regard to the nature of the illness, which was long protracted, the doctrine of *marz-ul-maut* did not apply, and (3) that even if the doctrine of *marz-ul-maut* did apply, the transaction was a waqf and was valid to the extent of one-third of the entire property of Manzur Ahmad. In answer to the suit brought by Fazl Ahmad, Rahim Bibi pleaded that the gift of the money was valid because *marz-ul-maut* did not apply and that the money was transferred not as a gift but in discharge of a debt due by the deceased to her.

Both suits were tried together upon the same evidence. We have come to the conclusion, for reasons which we shall state later on, that the transfers of the villages and of the money etc., to Rahim Bibi were in truth and in fact gifts to Rahim Bibi, made by the deceased because he wished to benefit her more than his other heirs. In this view of the case the all-important issue is whether or not the illness of Manzur Ahmad was such as to render the gifts void according to the rule of Muhammadan law that gifts made in *marz-ul-maut* are invalid. Rahim Bibi has, since Manzur Ahmad's death, attempted to make a waqf of the property

(perhaps more or less illusory) and she has given away most of the money to her own relatives who are not heirs of Manzur Ahmad. We may mention here that the learned counsel for Fazl Ahmad in the appeal before us abandoned the contention that the deceased did not know and understand what he was doing when he made the transfer, and learned counsel laid no stress on the evidence of Fazl Ahmad or his witnesses.

[Here their Lordships discussed the evidence and proceeded as follows.]

During all this time and when the deceased died he was staying in the house of Ala-ud-din. In the same house also lived Wisal-ud-din, a nephew of Rahim Bibi, that is to say, the son of her deceased brother. Wisal-ud-din and his brothers are the persons in whose favour Rahim Bibi has since parted with the greater part of her property, and they were not heirs of Manzur Ahmad.

As already stated, while the deceased was staying in this house he had sent to Dhundri to have the four thousand sovereigns dug up from the house of Jilani Bibi in order that they might be re-buried in the house of his mother Rahim Bibi. Directions were also given to bring the Rs. 8,500 to Khub Chand, banker. The latter money duly reached Khub Chand, but the sovereigns after being dug up were stolen, (half were afterwards recovered). This happened about the 20th of August, or a little later. On the 29th of August the deceased executed a deed of transfer in favour of his mother Rahim Bibi in the following form—"I, while in a sound state of body and mind, have absolutely sold of my own free will the entire 20 biswas zamindari property in Mauza Bithaura Kalan, pargana and district Pilibhit, and the entire 20 biswa zamindari property in Mauza Amkhera, including the hamlets called Zahurganj, Manzurganj, Samaria, and Makruli, pargana Richa, tahsil Baheri, district Bareilly, and with all the appurtenances and interests appertaining thereto, without the exception of any right or share, to my mother, Musammat Rahim Bibi, wife of Sheikh Zahur Ahmad, Sheikh, resident of Mauza Dhundri, pargana Jahanabad, district Pilibhit, for two lakhs of rupees, half of which is one lakh of rupees, and made over the possession of both the properties sold

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to the vendee. Now neither I nor any of my representatives have any right in the above mentioned properties sold. Out of the entire sale consideration I have received Rs. 10,000 in cash, and have left Rs. 1,90,000 with the vendee with my directions, in order that she may spend it with her own authority and at her own discretion for good purposes, for the benefit of my soul in the next world. Hence I executed this document as a sale-deed giving authority in respect of the sum held in deposit for charity, on a stamp paper of Rs. 2,000 under article 23, and on a stamp paper of Rs. 15 under article 7, schedule 1, Act II of 1889, so that it may serve as evidence."

Registration was duly effected and the deed has the following endorsement.—"Let it be known that the executant is ill and he submitted a certificate of his illness given by the Assistant Civil Surgeon, Pilibhit, who is now Civil Surgeon in charge of Pilibhit with his application for issue of a commission which is in the office."

The certificate is as follows:—"I came to dress Sheikh Manzur Ahmad of Dhundri at the time when the deed was presented and execution admitted by him before the Sub-Registrar. I found his mental faculties unimpaired, and he answered to every question referring to the deed quite correctly."

The deed was registered between 5 and 6 o'clock in the evening on the 29th of August, 1912. This certificate was given by Dr. Chatterji at 5-30 in the evening. At 9-30 in the morning of the same day Dr. Chatterji had given another certificate as follows:—

"Certified that I examined Sheikh Manzur Ahmad, zamindar of Dhundri, this morning at the request of the Sub-Divisional Magistrate and found his mental faculties not affected yet, although his general condition is extremely weak."

It is pretty clear that the Sub-Registrar had some hesitation in registering the deed, having regard to the condition of the deceased, and, notwithstanding the explanation which Dr. Chatterji gave when giving his evidence, we think that his first certificate shows that the deceased's condition was very critical on the morning of the 29th of August. The certificate was given in English and Dr. Chatterji understands English. The words

"found his mental faculties not affected *yet*," are significant. Immediately after the execution of the deed men were sent off post haste to make collections at the two villages and to apply for mutation of names. It was not the time of year at which collections are made, and the collections which were in fact made were more or less of a formal character: obviously the intention was to show that the deed had been acted upon and possession taken. Certainly these steps were taken with the least possible delay.

[After discussing the evidence their Lordships proceeded as follows:—]

The conclusion that we have come to is that the illness of Manzur Ahmad all along rapidly progressed and increased between June, and the 2nd of September, when he died, and that it cannot possibly be said that he suffered from a lingering disease. There is no very satisfactory evidence when consumption commenced, but, even if we assume that the seeds of the disease were present for some time, the progress of the disease was rapid between June and the 2nd of September. We believe Dr. Chatterji when he says that when Manzur Ahmad left him on the 7th of August, the deceased was under the apprehension of death, and if this view be correct, nothing which subsequently happened was at all likely to lessen that apprehension. The sufferings of the deceased continued steadily to increase. The evidence of Rahim Bibi herself shows that the deceased apprehended death and that she was frequently trying to console him and remove his apprehension. We think that the two certificates which Dr. Chatterji gave show that those about Manzur Ahmad believed that he was going to die, and that this apprehension was shared by the Sub-Registrar. That those who were about him (near relatives of Rahim Bibi) believed he was going to die is also shown by the very great haste there was in sending off men to make the collections at the two villages and filing an application for mutation of names on the 30th of August. What other people thought who were daily seeing the deceased is not without some bearing on what the deceased was likely to think himself. The learned Judge referring to the evidence of Abdul Aziz, a witness for Fazl Ahmad, says that the deceased told the witness that he was better and that *as soon as he would recover he would*

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show him the villages that required water. This is not quite what the witness said. Witness said that the deceased said "if he recovered." The learned advocate for Rahim Bibi admitted that if there was a rapid increase in the disease about the time when the "gift" was made, and if the deceased was under apprehension of the near approach of death, the rule of *marz ul maut* would apply, even though the deceased had been suffering from consumption for more than a year before he made the gift. In our opinion the illness of the deceased was not a lingering disease, and he was under the apprehension of near approaching death, and if the transfers of the money and of the land ought to be regarded as "gifts" to Rahim Bibi, they were void under the Muhammadan law as having been made when the donor was suffering from his death-illness. The doctrine of *marz-ul-maut* is founded on the Koran, which ordains that *the heirs must inherit*. Even though our sympathies may be to some extent more with Rahim Bibi, the affectionate mother of the deceased, we are bound to administer the law.

The next question we propose to deal with is what was the real nature of the transaction. If the transaction was a sale, the doctrine of *marz-ul-maut* does not apply. If the transaction was the creation of a waqf by the deceased, the transaction would be good to the extent of one-third of the entire estate of the deceased. If it was a gift to Rahim Bibi one of the heirs, it was altogether void. On the face of it the deed is a sale deed. But it is abundantly clear that Rahim Bibi had nothing like two lakhs of rupees wherewith to purchase the property.

[Their Lordships, after discussing the evidence further, proceeded as follows :—]

As to the question of waqf.

The deed does not say that the villages were to be held as waqf property. If the deceased wanted to dedicate the villages, there is no reason why he should not have expressly dedicated them, as he did the property in 1916, on the occasion of his previous illness. If he did not think he was going to die, he might have named himself as *mutawalli*, as he did in 1909, or he might have named his mother *mutawalli*. The deed only says that Rs. 1,90,000 of the price (which was not and could not

be paid) was to be applied for charitable purposes at the discretion of his mother. Looking at the evidence of Ala ud din, of Rahim Bibi herself, the condition of the donor and the surrounding circumstances we have come to the conclusion that the handing over of the sovereigns and the transfer of the Rs. 8,500, Rs 16,876 and the two villages were in truth simply gifts made by the deceased to his mother and the provision in the deed that Rs. 1,90,000 should be applied in charity at the discretion of Rahim Bibi was a somewhat ingenious device to give the transaction the appearance of a sale so as to evade the Muhammadan law, which forbids a Musalman in his death-illness to make a gift to one heir at the expense of the others.

[Their Lordships again dealt with the evidence and observed:—]

On both sides, there was, as the learned Judge says, a considerable amount of hard swearing. Fazl Ahmad not only alleged, but stated in his evidence that the deceased did not even know the contents of the deed. While we think that the deceased was in a very weak condition when he executed the deed, we agree with the court below that he understood what he was doing.

[Here the evidence was discussed.]

We have come to the conclusion that this appeal must be allowed. But to mark our strong disapproval of some of the evidence adduced on behalf of Fazl Ahmad we disallow all costs of witnesses in the court below. The order of the Court is that the appeal is allowed, the decree of the court below is set aside and the claim of Rahim Bibi is dismissed with costs in both courts, save as mentioned above.

We direct the Receiver to prepare and bring in as soon as reasonably possible a final account with a view to his being discharged.

Appeal allowed.

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FULL BENCH.

*Before Justice Sir Pramad Chandra Banerji, Mr Justice Priggott and
Mr. Justice Walsh.*

BHARAT SINGH (PLAINTIFF) v TEJ SINGH AND ANOTHER (DEFENDANTS)*
Act (Local) No II of 1901 (Agra Tenancy Act) sections 164 and 166—Lambardar and co-sharer—Suit for profits against lambardar—Death of defendant pending suit—Liability of representative for sums not collected owing to negligence of lambardar.

Held on a construction of sections 164 and 166 of the Agra Tenancy Act, 1901, that where, a suit for profits having been filed against a lambardar, the lambardar dies pending the suit, and his legal representative is brought on the record as defendant, the representative is, so far as the assets of the deceased lambardar in his hands are concerned, liable to the same extent as the lambardar, that is to say, not only for money actually collected by the lambardar, but also for money left uncollected owing to his negligence or misconduct. *Murad-un-nissa v Ghulam Sajjad* (1) and *Dip Singh v Ram Charan* (2) distinguished.

THE facts of the case fully appear from the following extracts from the order of WALSH, J., referring the appeal to the Chief Justice for the appointment of a Full Bench:—

This is a suit under section 164 of the Tenancy Act of 1901. The suit was brought by the plaintiff, a co-sharer, against Kundan Singh, the then lambardar and another defendant, the vendor of the plaintiff, whose position is immaterial to the question raised in this appeal. The claim made was for the plaintiff's share of the profits which Kundan Singh had actually collected and also for such sums as owing to his negligence or misconduct he had failed to collect. During the suit, and before the date of hearing, Kundan Singh died, and the present defendant Tej Singh, the son and heir, was brought on the record as his personal representative, and the suit proceeded against the defendant, the personal representative, as such, in respect of the liability of his deceased father which had accrued before the death of the father to the extent of the assets which came into the hands of the defendant as his father's representative. The son is not sued in his personal capacity, nor does the action relate to any failure to carry out

* Second Appeal No. 795 of 1916, from a decree of Dunga Dat Joshi, First Additional Judge of Aligarh, dated the 17th of February, 1916, reversing a decree of R. D. W. D. MacLeod, Assistant Collector, First Class, of Aligarh, dated the 11th of August, 1915.

(1) (1897) I. L. R., 20 All., 73. * (2) (1906) I. L. R., 29 All., 15.

the duty of lambardar, or misfeasance in carrying out the duty, after the death of Kundan Singh. The sole questions therefore in the suit are what would have been the liability of Kundan Singh under section 164, if he had lived, and what is the liability of his estate now that he is dead. The lower court has held that the son is not liable for the misconduct and negligence of his father and from that decision this appeal is brought. In the sense that a son is not liable for the torts of his deceased father, it is an accurate expression of the law, but in my opinion the negligence or misconduct mentioned in section 164 is not a tort at all. It is the breach or neglect of an obligation of *quasi* contractual nature arising out of an agency or trust undertaken by the lambardar by the acceptance of the post and imposed upon him by Statute *viz*, section 164.

There is a considerable body of authority that the liability for sums remaining uncollected does not survive under this section after the death of the lambardar. By that authority I am bound, and therefore I must either dismiss the appeal or refer the matter to the Chief Justice for further consideration by a Full Court.

“The general rule” says Williams on Executors, Volume II of the 10th Edition, page 1343, “has been established from very early times with respect to such personal claims as are founded upon any obligation, contract debt, covenant or other duty, that the right of action on which the testator or intestate might have been sued in his life-time survives his death and is enforceable against his executor or administrator. Therefore it is clear that executors or administrators are answerable, as far as they have assets, for debts of every description due from the deceased.” Again, on page 1343, after pointing out that in cases of tort, if the person by whom the injury was committed dies, no action of that kind can be brought against his executor or administrator, the author goes on:—“But the case is different where the act is not a mere tort, but is a breach of *quasi* contract, where the claim is founded on a breach of fiduciary relation or on failure to perform a duty.” I take it to be impossible to deny that the duty of a lambardar imposed upon him by this section, to take reasonable care to collect the profits and to hand over what he has collected,

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comes within the definition which I have read and the liability survives after death.

An examination of the section shows that it contains nothing to the contrary. Sub-section (1) provides that a co-sharer may sue the lambardar for his share of the profits. By section 166, the word 'lambardar' there includes heirs and legal representatives. Sub-section (2) provides that in any such suit the court may award to the plaintiff sums remaining uncollected owing to the negligence or misconduct of the defendant. Plaintiff in sub-section (2) means co-sharer and defendant means lambardar. They are merely synonymous. Apart from authority, therefore, having regard to the common law and sections 164 and 166, I find considerable difficulty in seeing what defence a son has, in respect of assets in his hands, to an action brought against his father under section 164, during his father's life-time. With great diffidence I think that the authorities to the contrary are not satisfactory. In this case the defendant was the lambardar when the suit was instituted and the cause of action must be determined at the time of the commencement of the suit, and therefore there is a distinction between this and the case reported in I. L. R., 29 All., 15. I think the matter is one which I ought to refer to the acting Chief Justice with a view to having the question re-considered by a Full Bench.

Dr. Surendra Nath Sen, for the appellant :—

In a suit instituted against a lambardar under section 164 of the Tenancy Act, if the lambardar dies in the course of the suit, what is the measure of the liability of his legal representative who is brought on the record? That is the question for determination in this appeal. The enforcement of the liability will, of course, be limited by the amount of the assets of the deceased lambardar in the hands of his legal representative; the question is what is the extent of the liability? If the lambardar had not died *pendente lite* the plaintiff would unquestionably be entitled, under clause (2) of section 164, to get profits not only on the collections actually made by the defendant lambardar, but also on sums left uncollected owing to his negligence or misconduct. The mere fact that the original defendant died during the pendency of the suit would not alter the rights of the plaintiff or affect the

suit in any way, and the liability of the original defendant would attach unaltered to his assets in the hands of his legal representatives. In other words, the right of suit survives in its entirety against them; the same cause of action and the same suit continue against them. This is made clear from a comparison of the language of the present Act and of that of Act XII of 1881. In section 164 of cl. (2) of the present Act, the word "defendant" has been substituted for the word "lambardar" in section 209 of the former Act, and a new provision introduced by section 166. By this change the Legislature has made it quite clear that a suit brought against the lambardar can be continued unchanged against his legal representatives. A consideration of general principles, apart from the enactment, also points the same way. The liability of a lambardar in respect of the payment of profits to the co-sharers is not of the nature of a personal tort, but is a *quasi* contractual liability. His position is like that of a trustee or agent of the whole body of co-sharers. Having regard to the nature of his position, the obligation is not merely personal but *quasi* contractual. That being the case, the liability is not altered by the mere fact of his death during the pendency of the suit and the substitution of his heirs on the record. The word "defendant" in section 164, cl. (2), means the original defendant to the suit, who, in the present case, was the lambardar himself. The case of *Dip Singh v. Ram Charan* (1) is distinguishable. There the suit was brought *after* the death of the lambardar, against his legal representative. The other cases mentioned in the referring order were decided under the former Act, XII of 1881. Moreover the decisions were based on the view that the liability of a lambardar was a personal liability only. The case in the Allahabad Weekly Notes for 1886 at page 32 was, again, a case in which the suit was instituted against the heir of the deceased lambardar.

Babu *Piari Lal Banerji*, for the respondents:—

In order to ascertain the basis of a lambardar's liability it is necessary to consider his position. He is not a trespasser or a person in wrongful possession and cannot, like them, be made liable for mesne profits which he has not collected. But for

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section 164 (2), he cannot be made liable for what he has not collected, i.e., liable by way of damages. Although this liability is statutory in character, it is really based upon a liability for damages. A lambardar makes no contract whatsoever with the co-sharers. He may, at the outside, be regarded as making a contract with the Collector. Negligence or misconduct in the performance of duty is always a tort. In confining the lambardar's liability in respect of sums left uncollected to those sums which are proved to have been uncollected owing to his negligence or misconduct, the Legislature clearly shows that it regards his liability as being based on tort. This liability, being a personal one, based on tort, cannot be enforced against his legal representatives. Where the estate of a tort-feasor has not been enriched the estate as such is not liable, but the tort-feasor is only personally liable in damages. The leading case on the subject of liability of representatives is that of *Phillips v. Homfray* (1).

Reference was made to *Williams: Law of Executors: Tenth Edition*, page 1352, 1356. The following cases also support the view that the liability of a lambardar in respect of non-collections is a personal one, based on tort, and cannot be enforced against his heirs and legal representatives: *Gulab v. Fateh Chand* (2), *Murad-un-nissa v. Ghulam Sajjad* (3) and *Bir Narain v. Girdhar Lal* (4). The next question is, whether there are sufficient grounds for supposing that the Legislature, in the present Act, altered its view of the character of this liability and regarded it as resting on some other basis. The alterations made by the present Act are the enactment of section 166, and the change of the word "lambardar" to the word "defendant" in section 164(2). By the first, suits were allowed to be brought in the Revenue Courts against the heirs of a lambardar, whereas the former Act XII of 1881 allowed suits only against the lambardar himself. Under that Act, however, a suit which had been brought against the lambardar could, on his death, be continued against his heirs, who were brought on the record, as happened in both the cases in I. L. R. 20 All, cited above. The continuation of the suit against the heirs is not a new feature introduced by

(1) [1883] 24 Ch. D., 489.

(3) (1897) I. L. R., 20 All., 73.

(2) Weekly Notes, 1886, p. 32.

(4) (1897) I. L. R., 20 All., 74.

the present Act, and there has been no change of policy so far as suits instituted against a lambardar, who happens to die *pendente lite*, are concerned. The second alteration, namely, that of the word "lambardar" to the word "defendant," was necessitated by the fact that under the present Act a suit could be brought against the heir of a deceased lambardar. By this alteration the Legislature clearly indicated an intention that the heirs of a deceased lambardar were not to be made liable for the non-collections of the lambardar. If the word "lambardar" had continued to stand as it was, then in a suit instituted against the heirs of a lambardar, a decree would be passed against them in respect of the sums left uncollected through the negligence or misconduct of the deceased lambardar. In keeping with the view that the liability for non-collections was personal to the lambardar, and to prevent the liability from being enforced against his heirs, the Legislature altered the word "lambardar" to "defendant." Further, clause (2) of section 164 deals with the powers of the court in passing a decree; it fixes the limits of the decree to be passed. It is reasonable, therefore, to construe the word "defendant" as meaning the defendant against whom the court is going to pass a decree. Clause (2) has reference to the time at which the court's award or decree is to be made. If at that time there is before the court a person answering to the description of a defendant through whose negligence or misconduct sums have remained uncollected, then the court can pass a decree in respect of those sums against him. In the present case the defendant against whom the decree was to be passed was, obviously, not a person guilty of any such negligence or misconduct. It is quite clear from the use of the word "defendant" in clause (2) that where the suit is instituted against the heir he cannot be made liable for the negligence of the deceased lambardar. It would be a recognition of the same principle to hold the same where the lambardar was sued in the first instance but died after the institution of the suit.

Dr. *Surendra Nath Sen*, was not heard in reply.

BANERJI, J.—This appeal arises out of a suit brought for the recovery of the share of profits of a co-sharer, for the year 1318 Faslī. The plaintiff is the assignee of the profits from the

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co-sharer who is the second defendant in the suit. The suit was brought against Kundan Singh, who was the lambardar in the year in question. The plaintiff claimed a share, not only of the profits actually realized but also of the profits which, according to him, had not been realized by the lambardar through gross negligence and misconduct. During the pendency of the suit the lambardar died, and his legal representative, Tej Singh, was brought upon the record. He contended that he was not liable for amounts which his predecessor in title, namely, Kundan Singh, had neglected to collect. The court of first instance repelled this contention, and made a decree for what it held to be the total amount shown in the rent roll and other sums which had not been shown in the rent roll but which the lambardar must be taken to have realized. Upon appeal by the defendant, the legal representative of the lambardar, the lower appellate court dismissed the suit holding that the representative of the lambardar could not be held liable for amounts which the lambardar had through misconduct and negligence not collected, and as the amount actually collected fell short of the Government revenue and cesses paid by him, the plaintiff was not entitled to recover anything from the defendant. From this decision of the learned Judge of the lower appellate court the present appeal has been filed. The question we have to determine is whether in the circumstances of the present case, the contention of the defendant is a valid contention. It seems to me that the decision of the case turns upon the construction of section 164 of the Agra Tenancy Act, under which the suit was brought. That section provides that "a co-sharer may sue the lambardar for his share of the profits of a mahal or of any part thereof. In any such suit the court may award to the plaintiff not only a share of the profits actually collected, but also of such sums as the plaintiff may prove to have remained uncollected owing to the negligence or misconduct of the defendant." What we have to consider is what is the scope of this section. The test for answering the question is whether by the word "defendant" the Legislature meant the original defendant to the suit or the person who was in the array of defendants at the time the decree was passed. By section 166, a 'lambardar' includes the heirs

legal representatives, executors, administrators and assignees of the lambardar. The present suit was not brought against a representative of the lambardar but against the lambardar, himself. Sub-section (2) seems to me to refer to the case of a person who was sued as the original lambardar, and in that view the misconduct or negligence which would entitle the plaintiff to recover a share of the amount which remained uncollected, would be the misconduct or negligence of the defendant who was sued, namely, (as in the present case) the original lambardar. If the person who was sued was the representative of the lambardar, he would be the defendant in the suit and he would not be liable according to the language of the section, as the misconduct or negligence could not be his misconduct or negligence. However, we are not called upon to decide that question in this case. In the present case, the original lambardar who made the collections in the year in question was sued, and it was after his death that his representative was brought upon the record. The word "defendant" in sub-section (2) of section 164 contemplates, in my opinion, the original defendant to the suit, and therefore the amount to which the plaintiff would be entitled would include such sums as remained uncollected owing to the negligence or misconduct of the original defendant, that is, of the lambardar. This may create an anomaly, but we have to construe the section as it stands. The case of *Murad-un-nissa v. Ghulam Sajjad* (1), to which reference was made, was a case under Act XII of 1881. Section 209 of that Act provided that in a suit brought against a lambardar for a share of profits, the plaintiff would be entitled to a sum equal to the plaintiff's share in the profits which through gross negligence or misconduct the lambardar had omitted to collect. That was a suit in which the heir of the lambardar was subsequently brought upon the record on the death of the lambardar. Having regard to the provisions of section 209, the liability of the lambardar would be for amounts which he had not collected. The word "lambardar" in Act XII of 1881, did not include the legal representative of a lambardar and therefore having regard to the fact that the word "lambardar" was used in that section, the heir of a lambardar could not

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be held liable. That case, therefore, does not seem to have any bearing upon the question we have to decide with reference to the language used in section 164 and the addition of section 166 to the present Tenancy Act. The case of *Dip Singh v. Ram Charan* (1), was a suit against the heir of a deceased lambardar and was brought under the present Tenancy Act. In that case it was held that having regard to the use of the word "defendant" in the section, the heir, who was the defendant, could not be held liable, as the negligence or misconduct referred to in the section was not his negligence or misconduct. This, therefore, does not help us in the decision of the present suit. In my opinion, in view of the provisions of section 164, the question of gross negligence or misconduct of the original lambardar, against whom a suit was brought, would have to be gone into, and, if such negligence or misconduct was shown, his representative would be liable to the extent of the assets of the deceased which came into his hands. In any case the liability of the representative of the lambardar would not be a personal liability. On principle it does not seem that the assets of the deceased lambardar should escape liability simply because the said lambardar who had neglected to make collections or was guilty of gross misconduct happened to die after the expiry of the year during which the collections had to be made. In my opinion no question of tort or of quasi contract arises under the circumstances mentioned above. The case, as I have already said, depends upon the construction of section 164, and I would construe the section in the manner I have stated above. In my opinion the decision of the lower appellate court ought to be reversed and the case remanded to that court.

PIGGOTT, J.—I concur both in the proposed order and in the reasons given for the same. I only wish to refer to the provisions of order XXII, rule 4, of the Code of Civil Procedure, as further strengthening the position taken up. When the suit was instituted the original defendant Kundan Singh was under a liability to the plaintiffs, by reason of the provisions of clause (2) of section 164 of the Tenancy Act. On his death his son Tej Singh was brought on the record as his legal representative. It

(1) (1906) I L. R., 29 All., 15.

was then open to Tej Singh to make any defence appropriate to his character as a legal representative of Kundan Singh deceased. If Tej Singh had been sued as an original defendant after the death of his father it would no doubt have been open to him to say that, under the Statute, the negligence or misconduct on which a certain liability was imposed must be that of the defendant in the suit, and that he himself could not be held liable for any negligence or misconduct on the part of his father; but such a defence is, in my opinion, inappropriate to the character of Tej Singh as a legal representative of a deceased defendant brought upon the record under order XXII, rule 4, of the Code of Civil Procedure. This was a case in which it could not be pleaded that the right to sue did not survive, within the meaning of the rule in question; and, if the right to sue survives, it must do so against the legal representative of a deceased defendant in the same manner as against that defendant himself. In my opinion, on the wording of sections 164 and 166 of the Tenancy Act, the plaintiff's claim, based upon the second clause of section 164, was maintainable against the legal representative of Kundan Singh after the death of Kundan Singh.

WALSH, J.—I agree.

BY THE COURT.—The order of the Court is that the appeal is allowed, the decree of the court below is set aside and the case is remanded to that court with directions to re-admit it under its original number in the register, and to try and determine the other questions which arise in the case. Costs here and hitherto will be costs in the cause.

Appeal allowed and cause remanded.

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Before Mr. Justice Piggott and Mr. Justice Walsh.

MOTI CHAND AND OTHERS (PLAINTIFFS) v. LALTA PRASAD AND OTHERS
(DEFENDANTS) *

Act No I of 1872 (Indian Evidence Act), section 68—Admissibility of document in evidence—Mortgage-deed not proved, but terms thereof incorporated in a subsequent instrument properly executed and proved

Where a document, itself legally inadmissible in evidence, was subsequently referred to and partly incorporated in a second document of similar import duly executed between the same parties and registered according to law, it was held that the earlier document might be referred to for the purpose of explaining and amplifying the terms of the second, and of arriving at a correct conclusion as to the true nature of the transaction into which the parties had entered. *Fishmongers' Company v. Dimsdale* (1) and *Mitchell v. Mathura Das* (2) referred to.

THE facts of this case are, briefly, as follows :—

The plaintiffs, who were bankers of Benares, had from time to time advanced various sums of money to the defendants, who formed a joint Hindu family consisting of a father, Lalta Prasad, and two sons, Sri Krishn Chand and Jhabbu Lal, carrying on business as saltpetre merchants. In 1909, the parties came to an agreement that the sums advanced should be consolidated and treated as a loan and that the defendants should give the plaintiffs a mortgage on the joint family property as security. Accordingly, on the 15th of May, 1909, a mortgage was drawn up and signed by the two sons, whose signatures were duly attested. At that time, however, the father was not present. He signed the deed subsequently, on the 31st of May, 1909, but his signature was not attested. The deed was registered; but after registration it was discovered* that the scribe had incorrectly entered the interest payable as eight annas per cent. *per annum* instead of *per mensem*. The parties thereupon arranged for the execution of a second deed to correct the mistake. This deed was duly executed by all three members of the defendants' family on the 21st of July, 1909, and their signatures were duly attested. It was also registered. This document largely recapitulated the terms of the deed of the 15th of May. The defendants having made default, the plaintiffs instituted a suit for sale based on the

* First Appeal No 225 of 1915, from a decree of Gopal Das Mukerji, Third Additional Subordinate Judge of Aligarh, dated the 15th of April, 1915.

(1) (1852) 18 L. J. C. P., 65 : 6 C. B., 896.

(2) (1885) L. L. R., 8 All., 6.

mortgage deed of the 15th of May, 1909. At the trial it appeared that one of the attesting witnesses was dead and the other, though present, was not called. The court accordingly held that the mortgage-deed was not proved. But, relying on the deed so far as it might be evidence of a personal liability, it passed a personal decree against all three defendants for the amount found to be due.

The plaintiffs appealed, asking for a decree for sale. During the pendency of the appeal an opportunity was given to the plaintiffs appellants of calling the attesting witness who ought to have been, but was not, examined in the lower court, but he died before he was-examined.

The Hon'ble Sir *Sundar Lal*, the Hon'ble Dr. *Tej Bahadur Sipru* and Pandit *Radha Kant Malaviya*, for the appellants.

The Hon'ble Pandit *Moti Lal Nehru* and Dr. *Surendra Nath Sen*, for the respondents.

WALSH, J.—The facts of this case are remarkably simple, though the questions which have been raised and discussed before us have covered a wide area. The plaintiffs, who brought this suit in the court of the Third Additional Subordinate Judge of Aligarh to enforce a mortgage, or rather, as they alleged, two mortgages, dated respectively the 15th of May and the 21st of July, 1909, carry on business as bankers and commission agents in the city of Benares. The defendants at or about the time carried on business as saltpetre merchants, and were, in the year 1909, obviously in considerable difficulties. Through the medium of an agent or general-attorney of the plaintiffs, one Beni Prasad Dube, it was arranged between the plaintiffs and one of the defendants, Sri Krishn Chand, that, inasmuch as a considerable sums was already due from the defendants to the plaintiffs in respect of commission and other dealings which had taken place between them, the plaintiffs, instead of pressing for payment, should render assistance to the defendants by treating the existing debt as a loan and taking security over their property. The present defendants were members of a joint Hindu family and carried on business together as such, Lalta Prasad being father and Sri Krishn Chand and Jhabbu Lal being the two sons. There was a good deal of delay in the completion of the necessary

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formalities to carry out the transaction, due apparently to some discussion with regard to the amount of the outstanding account between the defendant and the plaintiffs at that date. This, however, is not material, because the amount of the debt was agreed, and there is in fact no dispute as to the substantial effect of the transaction which was entered into. The whole difficulty that has been raised is one of form. A document was prepared by a pleader, which was intended to be a mortgage to carry out the arrangement which had been agreed upon. It was written by a scribe of the name of Makundi Lal, and the plaintiff's general-attorney Beni Prasad, according to his own account, with certain other persons who were to act as witnesses, attended at one of the defendants' places of business in Farrukhabad. The father was absent. It is suggested that he was keeping out of the way on account of the pressure of his creditors. However that may be, it is clear that he was not present on the occasion when the parties met with a view to executing the document, and it was signed only by the two sons above mentioned and by Sheobandhan Dube and Janki Das as attesting witnesses. It was also signed by his own hand by the scribe in the sense that it contained a clause in his own hand-writing stating that he had written the document on the 15th of May. And undoubtedly at one time it was suggested, and one of the grounds raised in the memorandum of appeal was, that if there was any defect in the document by reason of the absence of sufficient attestation, that was cured by the clause containing the signature of the scribe. That argument, however, was not seriously pressed; the scribe's evidence shows that he did not purport to attest and no further reference need be made to it. The document having been thus executed by the two sons, whose signatures are said to have been attested by these two men, Sheobandhan Dube and Janki Das, it appears to have been originally intended to have the document registered in accordance with law as quickly as possible. But the plaintiffs, the mortgagees, required the signature of the father, and the document was sent to him for signature and returned to the son, * Sri Krishn Chand, duly signed by the father on the 31st of May, 1909, after a delay of some 13 or 14 days. What happened when the father affixed his signature does not appear. It is, however,

quite clear that his signature was not attested by either of the attesting witnesses to the deed. The document, having been thus executed and registered and being at that time clearly regarded by everybody as a complete, valid and properly executed mortgage-deed in accordance with the strict provisions of the law, was discovered to contain a slip by the scribe. The agreement had been for a rate of interest at eight annas per cent. per mensem, but only eight annas per cent. per annum was provided in the interest clause. It became necessary to correct this blunder, and by consent of every body a fresh deed was entered into on the 21st of July, 1909, with this object. The terms and effect of that deed it will be necessary to consider with some care hereafter. It was duly signed by Lalta Prasad, the father, and by both his sons in the presence of two attesting witnesses. It was duly attested by Janki Das, one of the attesting witnesses to the former deed, and by Makundi Lal the scribe, and it was registered according to law on the 16th of November, 1909. Default having been made, the plaintiffs instituted this suit on the 18th of April, 1914. Substantially there was very little contest about the merits. The main controversy turned upon the question of the attestation and the admissibility of the deed of the 15th of May, 1909. One of the defendants Jhabbu Lal put in no appearance. The other two, the father and one of the sons, admitting their signature, and, denying that the amount entered in the deed was correct, alleged that the deed had not been duly executed and that the signatures had not been attested according to law. The first court held that the document was inadmissible under section 68 of the Evidence Act for the following reasons. At the trial it appeared that Sheobandhan Dube was dead. Janki Das was in court. He was not called. The document was one which was required by law to be attested and no attesting witness, although one was alive, was called, as required by section 68 of the Evidence Act. He had been summoned and was present in court. The expression "called" used in the section clearly means tendered for the purpose of giving evidence. The learned Judge therefore had no alternative but to reject the document, and we agree with the course which he took and with the reason which he gave for so doing. Very little attention,

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judging from the evidence and from the judgement, appears to have been paid to the supplementary or second deed, of the 21st of July, 1909. But, relying on certain authorities which the learned Judge refers to in his judgement, he gave effect to the deed of the 15th of May, 1909, which he had rejected as inadmissible as a mortgage as evidence of a covenant to pay, and passed a personal decree against all three defendants for the amount due. Thereupon an appeal was brought to this Court by the plaintiffs, challenging the decision upon three grounds.

1. That the execution of the deed had been proved;
2. That the evidence of the scribe who had in fact been called was sufficient as that of an attesting witness; and
3. That the learned Judge had not properly weighed the evidence.

There was a difficulty in serving the respondents with the notice of appeal. Ultimately substituted service was ordered by means of advertisement in the newspapers, and, whether or not they had knowledge of the proceedings, they did not in fact appear, although the order for substituted service was duly carried out, at the hearing of the appeal which was opened before my brother PIGGOTT and myself on the 29th of March, 1917. During the discussion in the opening of the appeal it was pointed out, amongst other things, that there was some difficulty in appreciating the grounds upon which the learned Judge had given effect to the deed as a covenant to repay the money, while rejecting it as inadmissible under section 68, and it was urged upon us with some force that if the failure of the suit resulted from the omission to call Janki Das during the trial, that was an omission which might, subject to certain penalties, be repaired without injustice to the defendants, if we were to afford an opportunity to the plaintiffs of producing him as a witness in this Court. We made an order on the 29th of March, 1917 in the following terms:—"Without discussing further the question of law raised by this appeal, we think it sufficient to say that, under the circumstances, the appellants are entitled to an opportunity of producing before this Court for examination the witness Janki Das, who should perhaps have been produced by them in the court below. Assuming that the appellants are prepared to

deposit the necessary fees and expenses, we order that this case be put up on any near convenient date, and summons to issue for the attendance of the said witness, Janki Das, son of Khiali Ram, caste Mahajan, resident of muhalla Mufti Saheb, in Farrukhabad, in this Court on such date." Difficulties arose in carrying out that intention owing to the illness of Janki Das. Adjournments were applied for from time to time, which were granted in the hope that the whole thing might be settled by hearing the evidence of this witness, who might have been tendered in the court below. Unfortunately, the witness got worse and died, and it was therefore, impossible for the appellants to call him. The case, therefore, came on for re-hearing before us in the condition in which it was, when it was originally opened before us in appeal, with the addition which we had made by the order we passed on the 29th of March, 1917. On this occasion the respondents put in an appearance, and several questions have been argued in attack upon and in support of the decision of the court below. The real question which we have to decide is whether in fact the plaintiffs, in the events which have happened, have been able to establish by legal evidence the execution in their favour of a mortgage for this debt over the property of the defendants, and whether they are entitled to an order enforcing it in this suit. Now it is abundantly clear that the loan was made, that it was obtained by the defendants offering a substantial and valuable security, that the money is still due, and that the defendants have no merits of any kind. The case is an illustration of the pitfalls which the prudent provisions of the Legislature made for the protection of ignorant and foolish persons may possess for the ordinary men of business and the use that knaves may make of them. There are in evidence, some copy of letters, dated one of the 19th of May, 1909, and two each of the 1st of June, 1909. These, if genuine, are conclusive as to one material fact in dispute, namely, the attestation of the father's signature. Due notice to produce the originals of these letters was given to the plaintiffs through the Court on the 25th of January, 1915. Beni Prasad, the general-attorney of the plaintiffs, was cross-examined with a view to explaining the absence of the originals, which were not forthcoming. He

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explained that after some short period it was the practice in the plaintiff's business to weed out and destroy letters, and the topic was pursued no further. Clear notice was given to the plaintiffs of the existence of these letters. They were called upon to produce them, and the defendants were entitled to use their copies. We have examined the defendants' press copy letter book, in which these copies are contained. It is, relatively speaking, well kept and we are both satisfied that it is a genuine book.

These copy letters show three things. Firstly, that, after being written out the day before, the document of the 15th of May, 1909, was signed by the two sons and attested by Sheobandhan Dube, if not by Janki Das, but that on the 19th of May, the father had not signed it. Secondly, that registration was delayed until after the 31st of May, 1909, when the document was received back by Sri Krishn Chand from his father with the father's signature upon it, and that, if the plaintiffs had not insisted upon the father's signature, the defendants would have registered the document without it, regarding the execution as then complete, and, thirdly, that the defendants were in need of money, that they were in profound misery, that their honour was in jeopardy and that they were anxious to do all they could to complete the security.

What happened at the trial as to the failure to call the attesting witness has been clearly stated in the judgement of the first court and has already been referred to above. The only living attesting witness was present in court and was deliberately not called. This fact alone prevents the document by virtue of the provisions of section 68 of the Evidence Act from being "used as evidence," and if the plaintiffs' case rested upon the document of the 15th of May alone, it must fail. We see no escape from this conclusion.

It was urged that the events which happened in this Court on the 29th of March, 1917, and the death of the missing witness have removed this case from the operation of section 68. We cannot agree with this view. We ordered that the plaintiffs appellants should be given an opportunity of producing the witness. It seems to us that that order had none of the attributes

of finality. It was made at an *ex parte* hearing. The respondents ought not to be allowed to improve their position by the fact of their absence. But it appeared to us that, apart from the debatable point as to whether the learned Judge ought, in the circumstances, to have given a decree for the principal money at all, it was possible that the omission of the plaintiffs in the first court was a mere error of judgement which it was not too late to repair, and that by allowing them to repair it justice might be done by penalizing them by some order in respect of costs for their error. But it now appears perfectly clear that their act in refraining from calling Janki Das was due to their deliberate decision as to the conduct of their case. The letters of the 19th of May, and the 1st of June, 1909, though on the file, had not been printed in this Court's book and had unfortunately been ignored in the judgement of the first court and had not been considered relevant by the appellants in their presentation of the evidence. When we made the order of the 29th of March, 1917, we had no notion of their existence. They now make it plain that the plaintiffs' general-attorney endeavoured to prove the due attestation of the document of the 15th of May, by the grossest perjury. He swore that the signatures of the father and the two sons were affixed in his presence and in that of Janki Das, Sheobandhan Dube and the scribe. "Jhabbu Lal," he said, "read the document and the other defendants (that includes the father, there can be no mistake about it) heard it." The fact is that the father was not there. Further he said in cross-examination "nobody signed the document on the day it was written. The signatures of the witnesses and the executants were affixed on the following day. Lalia Prasad was not present on the day the document was written. He came the next day, and the signature was affixed on the same day." These statements are clearly deliberate falsehoods. Moreover, the evidence of Beni Prasad made an unfavourable impression upon the learned Subordinate Judge who was not inclined to believe that Beni Prasad was present even when the document was signed by the sons, and in this conclusion he is very likely correct. Makundi Lal was even more specific both in examination-in-chief and in cross-examination. He lied with elaborate and vivid

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detail and identified Janki Das as having attested all the three signatures on the same afternoon. He described in minute detail the process of execution and stated that Lalta Prasad affixed his signature first of all.

What the condition of Janki Das's mind may have been it is idle to speculate, but he could not, if called, have stated what the contemporaneous documents now show to have been the facts, without destroying the plaintiffs' case and casting discredit upon both their general attorney and the scribe. Had we known on the 29th of March, the real state of the evidence on the record, it is unlikely that we should have granted any indulgence to the plaintiffs who had conducted their case with such materials. We think it was open to this Court at any time to hear further argument and finally to refuse to allow additional evidence to be given. Our previous order, made by us under a misapprehension, cannot be used to enable the plaintiffs to avail themselves of section 69. We hold, therefore, that the document of the 15th of May cannot be used in evidence in the sense contemplated by section 68, that is to say, as a mortgage which is required by law to be attested and has in fact been attested.

The three letters to which I have referred further show that the document was not in any case duly attested, one of the signatories having clearly signed it at another place and on some date subsequent to the attestation by the only witnesses who are alleged to have attested. It was urged with great force by Sir *Sundar Lal*, on behalf of the appellants, that it might be treated as a document duly signed, attested and executed by two members of a joint Hindu family dealing with joint family property and that the consent of the remaining member of the family, in this case the father who alone could object, could be proved by any method known to the law. Speaking for myself I do not think it necessary to decide whether this contention is sound or not because in either view the provisions of section 68 not having been complied with, the document cannot be used as evidence at all as a document either requiring attestation or in fact attested.

But this does not, in the events which have happened, prevent it from being used in evidence as something else or for

any other purpose. It is obvious that section 68 is subject to some limitation, *e.g.* if the document were tendered in some other proceeding for the purpose of proving the hand-writing of the scribe, it could not seriously be objected to upon the ground that, no attesting witness being called to prove it, it could not be used in evidence at all. The second deed of the 21st of July as I have pointed out, was signed by all the parties to the transaction in this suit, and was duly attested and duly registered. It treated the document of the 15th of May as a valid mortgage-deed and repeated some, at any rate, of its stipulations as being the terms which were to govern the new contract. We think it quite clear that we are entitled to look at the document of the 15th of May identified by reference, as it clearly is, in the document of the 21st of July, in order to ascertain what these stipulations were. If they had been contained in some other kind of document, clearly identified, to which the parties agreed that reference should be made for the purpose of interpreting their rights and obligations, such a document would clearly be made admissible by the act and contract of the parties, even though as an independent legal document it was itself inadmissible. It derives its admissibility from another source which binds the parties. This would apparently be so according to English law, under what is described in Taylor on Evidence as the sixth exception to the rule of inadmissibility due to the absence of an attesting witness, if the party objecting to it took some benefit from the latter document which treated the earlier one as valid. This is not the case here: the party objecting clearly undertook a greater burden. But I think, in truth that it is not really an exception to the rule at all, but merely an illustration of a document to which the rule in England is inapplicable, and that the rule in India, that is to say, section 68, is equally inapplicable in the present case for the purpose of deciding whether the earlier document is admissible as a document to which the parties have referred otherwise.

The case before us on this point bears a remarkable similarity to the case of *Fishmongers' Company v. Dimsdale* (1). In that case the decision of the Chief Justice TINDAL, as reported in the

(1) (1852) 18 L. J., Q. P., 638, 10 C. B., 896.

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statement of facts at page 57 of the Law Journal Report, is precisely the objection now raised to the admissibility of the document of the 15th of May, but an exceptionally strong Court of the Exchequer Chamber overruled this objection and held that the document was admissible. The case occurred before the Common Law Procedure Act of 1864, and the rule of law which had to be dealt with, namely, with regard to the necessity of calling a subscribing witness in order to render a document admissible at all, in substance did not differ from section 68. Baron PARKE in giving judgement gave as the reason, that the memorandum endorsed, which corresponds in this case to the document of the 21st of July, incorporated the original agreement. I prefer the judgement of COLERIDGE, J., as reported in the Law Journal Report, who added his own reason in these words :—"There is a complete identification by words of reference." It is somewhat remarkable that when a similar case arose at a later stage with reference to its admissibility having regard to the stamp, the Chief Justice was overruled for treating the earlier document as incorporated thereby, following the dictum of PARKE, B (*vide* 22 L. J., C. P.). But the principle is clear, although the language in which it is expressed in the published report of the judgement may not be scientifically accurate, and we find it difficult to draw any distinction between that case and the case before us. We are referred to a further decision which is also very much in point. In 1885, in the case of *Mitchell v. Mathura Das* (1), which went to the Privy Council, the question arose as to the due registration of a deed of conveyance. There had been an earlier deed of 1870, which was not registered. The transaction was sought to be carried out and put in force through a subsequent deed, namely of 1878, which, no doubt, did a little more than the document of the 21st of July does, actually re-affirmed and repeated in its entirety the deed of 1873, referring to it in express terms and setting it out in a schedule as part of itself, namely, the deed of 1878. When presented for registration, the memorandum of registration was written not on the first sheet, but at the end of the deed which was annexed as a schedule to the deed of 1878. I take that statement from the judgement of Sir BARNES PEACOCK, on p. 10 and it would appear from that, that the deed of 1873 had actually been copied out or itself annexed

(1) (1885) 1 L.R., 8 All., 6

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as a schedule to the subsequent deed of 1878. But there can be no difference in principle whether the document is incorporated by actual physical annexation, or by reference in unmistakable terms of identification. The High Court in that case had held that the registration was insufficient because the latter document had not been registered and the endorsement upon the deed in the schedule being upon a document which in itself could not be proved, could not be looked at. The Privy Council overruled that contention in these words:—(p. 11) "That document (that is, referring to the earlier document) was not proved. It could not be proved because it could not be given in evidence. But the fact that the deed itself could not be given in evidence was no reason why the deed of 1878 should not be given in evidence and that deed (referring to the deed of 1873) was proved to have been executed and duly registered." That language covers, in our view, in almost express terms, the point raised in this case, namely, as to whether the document of the 21st of July, having been duly executed and attested does not in sufficient terms refer to the earlier document, which was inadmissible in itself, so as to make it admissible as part of the latter document.

The question of interpretation remains. This of course is totally distinct from the question of admissibility. What is the effect of these two documents, bearing in mind that we are not entitled to treat the document of the 15th of May, as a mortgage at all or even as a document in itself binding upon the parties for anything? On the whole we think that the document of the 21st of July, 1909, hypothecates the property described in the specification, for interest at eight annas per cent. per mensem on the sum of Rs. 32,914-3-9, from the 15th of May, 1909. We also think, although we feel some doubt about it, that it sufficiently hypothecates the property for the principal sum. It clearly repeats or incorporates the clauses in the deed of the 15th of May, which relate to interest. It says "we shall pay interest on the debt due to the Babu Sahib, at Rs. 6 per cent. per annum, which is equal to eight annas per cent. per mensem, in accordance with the stipulation laid down in the aforesaid mortgage deed." The document must, at any rate, therefore be

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constituted as having contained within it, in express terms, at least clauses 1, 2 and 3 of the document of the 15th of May. Clause 2 provides that if the interest is not paid within 6 months the executants shall be liable to pay compound interest at eight annas per cent per mensem, and further that, (after fulfilment of certain provisions which involve a reference to the body of the document to ascertain the meaning of the words "the above term,") "the said Babu Sahibs will be at liberty to recover the entire amount payable to them by taking proper proceedings, from our person, the property mortgaged and other property, movable as well as immovable, belonging to us, the executants." The indebtedness for the principal is clearly acknowledged by the deed of the 21st of July and we find it difficult to give effect to clauses 1, 2 and 3, which are thus clearly incorporated and accepted in the document of 21st of July, as governing the payment of interest together with the consequences for non-payment without also giving effect to those parts of them which govern the payment of the principal. The two are indissolubly connected. The property mortgaged is clearly specified in the later document of the 21st of July: clause 2 can only mean that a power of sale is to be exercised by the Babu Sahibs for non-payment, and clause 3 refers to realization, which can only be read having regard to the provisions of clause 2 as meaning sale. The terms of section 58 defining a mortgage are:—"A mortgage is the transfer of an interest in specified immovable property for the purpose of securing an existing debt" "Where a mortgagor binds himself personally to pay the mortgage money and agrees expressly or impliedly that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the property to be sold and the proceeds of sale to be applied in payment of the mortgage-money, the transaction is called a simple mortgage." We think that that is what all three executants impliedly did when they signed the document of the 21st of July. Their intention is obvious. The only doubt is as to whether they carried it out. It was unnecessary that they should repeat in express terms all that they had agreed to in the previous transaction, for both parties treated the previous deed as binding upon them, but it

so happens that out of extra precaution they did repeat and reiterate those terms which we have mentioned and thereby impliedly gave the mortgagee a power to sell not only for the new rate of interest but for the principal. A mortgage need not be contained in one or any other particular number of documents. It may be collected from a variety of documents so long as the effective document is a duly signed, attested and registered instrument in accordance with section 59 of the Transfer of Property Act. We think that this is the real legal effect of the document which was duly executed and attested on the 21st of July, and that therefore the plaintiffs are entitled to succeed in this suit upon that ground. It is not the ground upon which the case was first launched in the plaint, nor upon which the case was fought in the first court, nor is it the ground upon which the plaintiffs by their memorandum of appeal sought relief in this Court, but we think it is the ground which gives effect to the real transaction between the parties, and which does substantial justice in spite of the mistakes the plaintiffs have made. The plaint and the memorandum of appeal must be treated as having been duly amended for the purpose of raising the claim in this form based upon the subsequent document of the 21st of July, 1909. But we do not think that the omission by the plaintiffs in the conduct of their suit ought to stand in the way of our doing what nobody can doubt is substantial justice in the case.

On the other hand we feel it impossible to pass by without marking our sense of the conduct of the plaintiffs in presenting their case to the trial court. As one would expect, no attempt has been made by their representatives in this Court to defend or justify it. We think that so far as that is concerned, the justice of the case will be met by altering the decree of the court below and giving them a decree for sale of the mortgaged property without costs either of the suit or of this appeal.

Piggott, J.—I agree generally. The only difficulty I have felt is with reference to the principal of the mortgage debt. I may put my point in this way : as regards the interest at six per cent. per annum it seems to me that, when the parties entered into the contract embodied in the agreement of the 21st of July, 1909, it was a definite part of the intention of the executants of

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that document to charge the extra rate of interest on the property which they conceived to have been already mortgaged by the deed of the 15th of May. They may have done this only by way of extra precaution; but on the terms of the deed of the 21st of July, 1909, even considered by itself alone, it seems to me that a hypothecation of the property specified at the foot for payment of the interest therein covenanted for is made by necessary implication. If the intention of the parties had been otherwise, I do not believe there would have been any specification of the property in this deed at all. As regards the principal my difficulty is this, that the parties conceived themselves to have already effected a valid mortgage of the same property as security for the repayment of this principal, and it was presumably no part of their intention on the 21st of July, 1909, to make a fresh hypothecation for that purpose. At the same time I agree with what has been said as to the anomaly of drawing any distinction between the effect of the transaction of the 21st of July, in respect of the principal and its effect as regards the interest. Broadly speaking, what the law requires is a registered instrument, duly executed and attested, in order to effect a mortgage; we have such an instrument before us in the so-called agreement of the 21st of July, 1909. I think that we are entitled to read it in connection with the earlier document to which it refers, and that the results stated in the judgement of my learned colleague necessarily follow.

By THE COURT.—We allow this appeal and direct that in lieu of the simple money-decree passed by the court below a decree for sale be drawn up in the proper form in respect of the property specified in the plaint. Interest must be calculated at the rate of six per cent per annum on the amount claimed up to the date fixed for payment, which we hereby fix at six months from this date. The decree will embody the usual provisions as to the consequences of payment or non-payment on the part of the judgement-debtors, and the same decree will carry future interest at six per cent per annum from the date fixed for payment until realization. For reasons which we have already stated we leave the parties to bear their own costs in both courts.

Appeal allowed.

REVISIONAL CRIMINAL.

1918
January, 5.*Before Mr. Justice Piggott.*

KALLU v. SITAL*.

Act No. I of 1872 (Indian Evidence Act), section 132—Act No. XLV of 1860 (Indian Penal Code), section 197—Witness—How far a statement made by a witness in giving evidence is privileged

A person who whilst giving evidence as a witness in court has made a statement which *prima facie* amounts to defamation under section 499 of the Indian Penal Code may plead one or other of the exceptions to that section, or he may claim the protection of the proviso to section 192 of the Indian Evidence Act, 1872, but in the latter case he must show that he was *compelled* to make the statement alleged to be defamatory in the sense that he had asked to be excused from answering the question which led up to it and the court had obliged him to answer it. *Queen v. Gopal Doss* (1), *Queen Empress v. Moss* (2) and *Emperor v. Ganga Prasad* (3) referred to.

THE facts of the case fully appear from the following judgment of the Sessions Judge.

This is an application in revision. It raises a point of law of very considerable difficulty. One Sarju made a report to the police in which he charged one Sital with theft. The case was investigated and Sarju's report was found to be false. Sarju was prosecuted under section 182 for his report, and Sital was examined as a witness. His deposition is in the usual narrative form. The questions are not recorded. The relevant portion of it is as follows:—"I did not steal the Ex. C Sarju bears enmity to me because we had a quarrel with each other about the middle common wall of the courtyard. I had illicit connection with Sarju's aunt Musammatt Chhotki. The accused and Mukhiya Sita Ram, when they came to know of it, were grieved. Sita Ram has come to court to-day and is outside. Sita Ram is a *biradri* of the accused and he, therefore, told me not to go to Musammatt Chhotki. I listened to him and gave up visiting Musammatt Chhotki. Even then he was not pleased with me as I had secret connection with Chhotki." The fact that Sital had made these statements about himself and Musammatt Chhotki became known to the *biradri*. The parties are *Kachhis*, and a *panchayat* was called, in which Sital was asked whether he had made these statements in court, to which he replied that he had; and whether they were true; he replied that they were true. Kallu, the husband of Chhotki, then made a complaint against Sarju for defamation. The learned Magistrate took the evidence for the prosecution and then discharged the accused. Kallu has made the present application in revision against that order of discharge.

* Criminal Revision No 728 of 1917, from an order of F. D. Simpson, Sessions Judge of Allahabad, dated the 9th of July, 1917.

(1) (1881) I.L.R., 8 Mad., 271. (2) (1898) I.L.R., 16 All., 388.

(3) (1907) I.L.R., 29 All., 685

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The first question is whether a witness can be prosecuted at all for a defamatory statement which he makes in court. It is settled law in England that he cannot. But the Indian law on the subject is contained in the Penal Code. Section 499 lays down a law of defamation which differs on many important points from the English Law on the subject. It was framed with great care and no less than ten exceptions are enumerated. It seems quite plain that if the Legislature had intended to embody the English Law on the subject, they would have done so in a special exception to section 499. For this Court, the matter is concluded by authority in *Ganga Prasad's* (1) case. It was held by two Judges against the third that such a prosecution lies. The decisions to the contrary were considered and dissented from. Therefore the present prosecution lies.

The next question is whether Sital is entitled to plead the bar of section 132 of the Evidence Act. Section 132 runs as follows:—"A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any Civil or Criminal proceeding, upon the ground that the answer to such question will criminate or may tend, directly or indirectly, to criminate such witness, or that it will expose or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind

"Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

The meaning of the word 'compelled' has been the subject of some difference of opinion; but it was held in *Moss's* case, that "compelled" only applies where the court has compelled a witness to answer a question, and not to a case in which the witness has not asked to be excused from answering a question, but gives his answer without any claim to have himself excused. This was the decision of a High Court Judge. So far as I know it has not been overruled. In the present case the witness did not object to the question. So section 132 will not avail him.

I now reach the difficult point in the case. If section 499 applies to witness, then a witness can only defend himself by bringing himself within one of the exceptions and the exception pleaded in the present case is the 9th. This will, as a rule, be the section which the witness will have to set up. "It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person or for the public good."

Now the person who pleads an exception has thrown on him the burden of bringing himself within it. This is laid down in section 105 of the Evidence Act. "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such

(1) (1907) I. L. R., 29 All., 685.

circumstances" Therefore it is necessary for a witness to prove that he made the imputation in good faith. Now in such a case as the present, it is clear that there can be no good faith unless the imputations are true. It might appear, therefore, at first sight that it is thrown on the witness to prove that the imputation is true. But this cannot be the intention of the Legislature. It would throw an intolerable burden on a witness. A witness is brought to court on summons, possibly against his will. He is then compelled to take an oath that he will speak the truth and the whole truth. Then a question is put to him. Let us say, that the question is, "Have you had illicit intercourse with B's wife?" He replies truly that he has. B proceeds to prosecute him, and it is thrown affirmatively on the witness to prove to the satisfaction of the court that he has had intercourse with B's wife, it may be quite impossible for him to do so. B's wife may not choose to admit her own dishonour. The witness may have taken particular pains that there should be no evidence in existence of the intrigue. Therefore I am prepared to hold that a person accused of an offence under section 499 who proves affirmatively that the imputation was made in the course of a deposition in court and that it was relevant to the matter in hand, has proved enough. The court will then go on and presume that the imputation was made in good faith, although it will not make the same presumption when the imputation was made out of court. It will then be for the other side to prove that the statement was untrue and therefore could not have been made in good faith. I have been able to find no authority for the proposition; but I think the language of the Code will bear such a construction and that the result of the opposite view is a *reductio ad absurdum*. If this principle is applied, the order of discharge appears to be right. The prosecution has not proved that the statement of Sital Din was false, and therefore I presume that it was made in good faith. It was certainly relevant to the case and made in protection of his interest. The subsequent statement made before the *panchayat* was a necessary result of the deposition. He was asked if he had made the deposition. He could not but admit that he had. He was asked if it was true. He could not but say it was. The application in revision is therefore dismissed.

The complainant Kallu applied in revision to the High Court. Babu *Piari Lal Banerji*, for the applicant.

Mr. *R. K. Sorabji* for the opposite party.

PIGGOTT, J.—The circumstances out of which this application for revision arises are as follows. One Sarju made a report to the police in which he alleged that Sital, who is the respondent, to the present application, had committed theft. Upon investigation this report was found to be false and a prosecution was instituted against Sarju, under section 182 of the Indian Penal Code, for having given false information to a public servant. Sital appeared as a witness for the prosecution in this

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case. He began by deposing that he had not committed the theft of which Sarju had accused him. The next question put to him must have been :—" Why then did Sarju make this false report against you " ? He replied that Sarju bore him enmity and went on to explain the grounds of that enmity. He said, first, that there had been a quarrel between them about a partition-wall between their courtyards. Apparently he felt it necessary to explain further, though it is impossible to say whether or not this explanation was added in reply to a direct question. He said that there had been for some time an intrigue between himself and an aunt of Sarju named Musammat Chhotki. It appears that this Chhotki is a married woman, and the result of the statement made by Sital in court was to bring social discredit on Kallu, the husband of the said Chhotki. It is in evidence that proceedings were taken by a *panchayat* of the brotherhood to which Kallu and Sital both belonged. It is quite clear, therefore, and is not denied, that Sital's statement with regard to his intrigue with Musammat Chhotki was defamatory of Kallu within the meaning of section 499 of the Indian Penal Code. It is also quite impossible to hold that at the time when he made this statement Sital had no reason to believe that this imputation would be harmful to the reputation of Kallu. It may be that, before this matter can be completely disposed of, the trial court will have to direct its mind to the question whether Sital made this statement intending to harm Kallu's reputation, or whether the harm thus resulting to Kallu's reputation was present to his mind when he made the statement, so that he could be said to have made the same " knowing that it was likely " to do harm. These considerations would be relevant on the question of sentence. But at the very lowest it cannot be denied that Sital had reason to believe that the imputation would do harm. If Kallu had believed the assertion made by Sital as to the unchastity of Musammat Chhotki to be true, he could have prosecuted him on his own admission for having committed an offence punishable under section 497 of the Indian Penal Code. Apparently Kallu believes that imputation to be false; he has accordingly instituted a prosecution against Sital for the offence of defamation punishable under section 499 of the Indian Penal Code. The

Magistrate who tried the case seems to have thought that he had only to consider whether the imputation made by Sital against the chastity of Kallu's wife had been made maliciously and, as he says, "merely with a view to disgrace Kallu," or whether it was made as a necessary part of the narrative which Sital had to lay before the court in the course of his deposition. Holding it not to be proved that the imputation had been made "with intent to cause disgrace," the Magistrate passed an order of discharge. Kallu brought the matter before the Sessions Judge, asking that court to set aside the order of discharge and to direct further inquiry. The learned Sessions Judge has disposed of the matter in an elaborate order in which he has discussed the previous decisions of this Court bearing on the question of law involved. The conclusion which he comes to is that, if a witness makes a statement in the course of a deposition in court, and the statement is one relevant to the matter in hand, the court will presume the said statement "to have been made in good faith for the protection of the interests of the person making it," within the meaning of Exception 9 to section 499 of the Indian Penal Code. I do not myself think that this is a sound proposition of law, and I am quite certain that it is not to be reconciled with the decision of the majority of a Full Bench of this Court in the case of *Emperor v. Ganga Prasad* (1). I do not altogether agree with the learned Sessions Judge when he says that the ninth Exception to section 499 of the Indian Penal Code is the only one to which a witness could apply for protection in respect of a defamatory statement made by him under the sanction of the oath in the course of a judicial proceeding. The ninth Exception is intended primarily to apply to statements which the accused cannot prove to have been true in fact, or which are mere expressions of opinion, or otherwise of such a nature that the question whether they are or are not true in fact does not arise. Ordinarily, the first Exception would apply to statements made by the witnesses in the course of judicial proceedings, provided those statements are true. They must be true in fact in order to come under the first Exception at all; and if they are true in fact and also relevant to the matter under investigation, it is

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(1) (1907) E.L.R., 29, All., 655.

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obviously for the public good that they should be made. In the present case these considerations are not of great importance; because, as the learned Sessions Judge himself rightly points out, Sital's allegation against the chastity of Musammat Chhotki could not have been made in good faith unless it was in fact true. If there were no other provision of the law to be considered except section 409 of the Indian Penal Code, the position of a witness in respect of offences under that section would be a difficult one. He would be liable to prosecution with regard to any statement made by him of a defamatory nature and, on such prosecution being instituted, the provisions of section 105 of the Indian Evidence Act would throw upon him the burden of proving that the statements were in fact true. The Legislature, however, seems to me to have fully realized this difficulty and to have made adequate provision for the same by means of section 132 of the Indian Evidence Act. To my mind the real question in this case is one of the interpretation of that section and its application to the facts of this case. A witness giving evidence in a judicial proceeding is under an obligation by law to state nothing which is not true, and, by reason of the oath or solemn affirmation taken by him in the presence of the court, to state, not merely the truth, but the whole truth touching the matter in question before the court. Now under section 134 of the Indian Evidence Act no answer which a witness is compelled to give, when giving evidence as to any matter relevant to the matter in issue in any suit, or in any Civil or Criminal proceeding, can subject him to any arrest or prosecution, or be proved against him in any Criminal proceeding, except on a prosecution for giving false evidence by such answer. A witness who has made a statement in the course of his deposition defamatory of another person, if he can claim the protection of this section, is absolutely safe so long as he has told the truth. If he has said what is not true, he can be prosecuted for giving false evidence; and even as regards the institution of such prosecution he is under the protection of the court before which his evidence was given. He cannot be prosecuted without the sanction of that court. Now, if it could be argued that the defamatory statement in this case was one which Sital "was compelled" to make, within the

meaning of section 132 of the Indian Evidence Act, the present prosecution would necessarily fail, and the order of discharge passed by the Magistrate would be perfectly correct. The question of the meaning of the words "no such answer which a witness is compelled to give," in the latter part of the aforesaid section 132, was considered by a Full Bench of the Madras High Court in the *Queen v. Gopal Doss and others* (1) and also by the Chief Justice of this Court in the case of *Queen Empress v. Moss and others* (2). In both these cases it was laid down that the protection afforded by section 132 of the Indian Evidence Act must be claimed by the witness before he makes the statement in respect of which a question is subsequently raised. Obviously no form of words can be prescribed in which this claim is to be made; and I conceive that cases may arise in which the courts will be compelled to hold that the claim has been made by implication, or that the witness was placed under practical compulsion to answer certain questions by the mere fact of his appearance in the witness box. Whether this be so or not, I think the principle laid down in these rulings fully applies to the facts of the present case. After Sital had stated that the charge brought against him by Sarju was false and made because of antecedent enmity existing between them, and that this enmity resulted from a quarrel about the partition-wall, he should either have contented himself with that statement, or have claimed protection of the court. It is not obvious on the face of the record as it stands that Sital was under any real necessity to go further. It has been brought to my notice that Kallu was one of the witnesses summoned for the defence in the case in which Sarju was on his trial, and it is open to argument whether Sital's conduct in alleging the existence of an intrigue between himself and Musammât Chhotki may not have been, in part at any rate, intended to discount beforehand the value of any evidence which Kallu might give in Sarju's defence. If he really felt that the court could not otherwise properly appreciate the nature of the grudge borne him by Sarju, and the strength of the motives which impelled Sarju to make a false report to his disadvantage, he ought to have claimed the protection of the court. The statement which he

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(1) (1880) I.L.R., 3 Mad., 271. (2) (1893) I.L.R., 16 All., 88.

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proceeded to make was one against the character of a woman, was seriously injurious to that woman's husband, who was no party to the proceedings then before the court; and one can help remarking that it was a statement which a man with sentiment of honour would have been very reluctant to make. Assuming in Sital's favour that this particular defamatory statement was extracted from him by some further question, I can avoid the feeling that it is a statement which he should naturally have shrunk from making. It would have been easy from him to reply that the quarrel about the partition wall was connected with another matter, in respect of which he could not lay entire facts before the court without making a statement which would criminate him or expose him to prosecution or other penalty. It seems to me at least possible that, if he had said this, the court would not have compelled him to answer the question, unless such answer had been pressed for by Sarja himself in the exercise of his rights as an accused person; and, of course, if Sarja had chosen to press the question, the responsibility for the answer would have rested largely upon him and the witness would have been completely protected by the provisions of the statute. In my opinion the order of discharge in this case cannot be supported on legal grounds, nor am I prepared to allow that this case is one in which the technicalities of the law should be regarded as bearing hardly upon the accused person. I set aside the order of discharge in this case and send the case back, through the Sessions Judge, to the trial court, directing the Magistrate to proceed with the trial of the case and to dispose of it in the light of principles which I have taken it upon me to lay down. In reply to a suggestion made to me on behalf of the applicant that the case is one which might be more efficiently tried by the Magistrate with a knowledge of the English language, I think it sufficient to say that, while it seems to me right and proper that the case should be sent back to the Magistrate who passed the order of discharge, my order is not to be interpreted as precluding the District Magistrate from exercising his power of transferring the case, if he should see adequate reason to do so.

TESTAMENTARY.

1916
December, 4.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Chaman Banerji.

IN THE GOODS OF MRS. E. E. W. MEIK.*

Act No VII of 1870 (Court Fees Act), sections 19, viii, 19I; schedule I, No. 11, and schedule III—Court fee—Computation of duty payable on probate or letters of administration

Held on a construction of the Court Fees Act, 1870, that no duty is payable in respect of a grant of probate or letters of administration where the value of the estate, after making the deductions specified in annexure B of the third schedule, is less than Rs. 1,000.

THIS was an application made by Mrs. A. S. Thompson, a sister of the deceased, for letters of administration to the estate of Mrs. E. E. W. Meik. The gross value of the estate was Rs. 1,426-3-3, but after deducting the amount of debts set forth in annexure B to the affidavit of valuation, the net value of the estate came to only Rs. 900-9-3. The applicant thereupon urged that, according to the provisions of section 19, viii, of the Court Fees Act she was not liable to pay any duty at all on a grant of letters of administration.

It was contended on behalf of the Board of Revenue that duty was payable on the gross value of the estate, or at any rate on the value of the residue after deducting the items set forth in annexure B of the affidavit of valuation, although such residue was below the value of Rs. 1,000.

Mr. A. H. C. Hamilton, for the applicant.

Mr. A. E. Ryves, for the Board of Revenue.

RICHARDS, C. J.:—A question has arisen as to the proper court fee payable in respect of this estate. It is admitted that the assets of the deceased, if no deductions are to be made for the debts or funeral expenses of the deceased, exceed Rs. 1,000 in value. On the other hand, it is admitted that if the debts and funeral expenses of the deceased are deducted, the assets are less in value than Rs. 1,000. The administratrix contends that no court fee is payable. On the other hand, the Board of Revenue contend that duty is payable either on the gross assets or on the net assets after deducting debts and funeral expenses. Section 19 of the Court Fees Act provides, *inter alia*, as follows:—“Nothing contained in this Act shall render the following documents charge-

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able with any fee." Amongst the documents set forth is "Letters of administration, where the amount or value of the property in respect of which the letters shall be granted does not exceed one thousand rupees." It is admitted here that the court fee, if payable at all, is payable under the provisions of the Act. Section 19 I provides that no order entitling a petitioner to letters of administration shall be made upon an application for such grant until the petitioner has filed in court a valuation of the property in the form set forth in the third schedule, and the court is satisfied that the fee mentioned in No. 11 of the first schedule has been paid. Schedule I, No. 11, provides, amongst other things, that letters of administration are subject to a fee of Rs 2 per cent. on the amount or value. The second column is a repetition of section 19, viii, providing that duty is payable when the amount or value of the property in respect of which the grant is made exceeds Rs. 1,000 but does not exceed Rs. 10,000. Schedule III contains the form of valuation referred to in section 19 I together with a form of affidavit to be made by the applicant. The first paragraph is a statement by the deponent that he has set forth in annexure A to the affidavit all the property and credits of which the deceased was possessed at the time of his death. Paragraph 2 is a statement by the deponent that he has set forth in annexure B all the items which by law he is entitled to deduct. Annexure B mentions amongst the items which the administrator is allowed by law to deduct, the debts due from the deceased and payable by law out of his assets, together with his funeral expenses. At the end of annexure A, which contains particulars of the gross assets, the following words appear:—"Deduct the amount shown in annexure B not subject to duty" and concludes with the words "Net total." The argument put forward on behalf of the Board of Revenue is that section 19, viii, only permits letters being granted without a court fee where the amount or value of the property in respect of which letters of administration are granted do not exceed Rs. 1,000. It is contended that the letters of administration cover all the gross assets, and that therefore the duty must be paid on the gross assets; and that, even if this is not so, the duty is at least payable at the rate of 2 per cent upon the gross assets after deducting such debts and other things.

as are permitted by law to be deducted. It seems to us that this last contention cannot be sustained, because either the duty is payable, as provided by the express words of the section, upon all the gross assets without any deduction or not at all. If section 19, clause viii, stood alone, this would appear to be the meaning of the provision, although no doubt it would appear to work some hardship. The duty is really payable by the persons beneficially entitled to the estate. We may give an example of the inequity that such a provision would appear to cause. A deceased person dies possessed of an estate worth Rs. 900 without any debts. The persons beneficially entitled to the estate pay no duty. Another man dies leaving a gross estate worth Rs. 1,500 but debts amounting to Rs. 600. The beneficiaries in this case must pay duty upon Rs. 1,500 although their interest in the estate is the same viz., Rs. 900. It is not easy to see why the beneficiaries in an estate like the last mentioned should even pay duty on Rs. 900, if the beneficiaries in the first mentioned escape. It remains to be considered whether upon the true construction of the Act, notwithstanding any hardship that may arise, duty is nevertheless leviable upon the gross value of the estate. We think that we are bound to read the schedules together with the Act. Section 19I, to which we have already referred, expressly provides that the petitioner for letters of administration must file a valuation in accordance with the third schedule, and that the fee is to be paid *in accordance with such valuation*. Again, turning to the third schedule, which contains the form for giving the valuation, the petitioner for letters of administration is stated to be allowed by law to deduct the debts, funeral and testamentary expenses, and in annexure A, which is headed "Valuation of the movable and immovable property of the deceased", the "net total" is made the total after deducting all the items which are set forth in annexure B, and which the petitioner for letters of administration is allowed by law to deduct. We think that on the true construction of the Act no duty is payable where the value of the estate after making the deductions specified in annexure B of the third schedule is less than Rs. 1,000. We accordingly hold in the present case, that the applicant is not liable for any court fee.

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January, 8.

REVISIONAL CRIMINAL.

Before Justice Sir George Knox.

EMPEROR. v. BAKHTAWAR.*

Act No. XIII of 1859 (Workman's Breach of Contract Act), section 2—Advances given by employer on agreement by workman to work for him for a certain specified period—Breach of agreement.

A workman living in Cawnpore took an advance of Rs. 10 from his employer and entered into an agreement to work for him for ten months on the understanding that one rupee was to be deducted from his wages each month. *Held* that such a contract contained nothing repugnant to Act No. XIII of 1859 and was capable of being enforced under the provisions of section 2 and 3 of that Act. *Lucas v. Ramai Singh* (1) followed.

IN this case one Bakhtawar, a workman living in Cawnpore, where Act No. XIII of 1859 is in force, entered into an agreement with his employer, having received an advance of Rs. 10, to work for him for ten months, and that one rupee should be deducted from his wages each month. Bakhtawar worked a short time, and then refused to go on working. Proceedings were taken against him under Act No. XIII of 1859, and the Joint Magistrate of Cawnpore took action under section 3 and ordered Bakhtawar to perform his contract on a bond for Rs. 50 with one surety in Rs. 50, or in default to undergo two weeks' rigorous imprisonment. The Sessions Judge disagreeing with the decision of the Magistrate referred the case for the orders of the High Court.

KNOX, J.—The learned Sessions Judge of Cawnpore has reported this case for orders. The case is thus stated by him:—One Bakhtawar, a workman already in the service of a master, whose name is not given, took an advance of Rs. 10 and promised to work for ten months on the understanding that one rupee was to be deducted each month from his wages. He worked for a very small portion of the time and then refused to go on working. The Joint Magistrate of Cawnpore directed him to perform the contract on a bond of Rs. 50 with one surety in Rs. 50 or in default to undergo two weeks' rigorous imprisonment. The learned Sessions Judge considers it absurd to allow an employer to tie down a servant to work with him for ten months on a mere advance of a sum amounting to Re. 1 for each month of the service. But he

* Criminal Reference No. 14 of 1918.

(1) Criminal Revision No. 235 of 1910, decided on the 21st of July 1910.

apparently feels that the language of the Act is too strong for his view unless it can be held that there is some lawful or reasonable excuse for refusal to perform the contract. In his referring order he says that Bakhtawar, so he is told, is perfectly willing to pay back the Rs. 10 and considers that an offer on Bakhtawar's part to pay back the Rs. 10 would constitute a reasonable excuse for refusing performance of the contract. Further, the learned Judge says that it is not clear whether there was any evidence of such an offer by the appellant, as the record is summary, and suggests that the High Court will be prepared to hold that any excuse is a reasonable excuse under section 2 of Act XIII of 1859 for not performing an unreasonable contract. Apparently the case of *C. J. Lucas v. Ramai Singh* (1),* decided on the 21st July, 1910, was never brought to the notice of the learned Judge. The difficulties which occurred to the learned Judge were put forward in that case and considered. That was a Division Bench case, and I am bound by the ruling. Over and above that I am not prepared to hold that such a contract is unreasonable or

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* (1) JUDGEMENT.—The parties to this application entered into an agreement, dated the 27th of March, 1903. The agreement was, as it purports to be, under Act XIII of 1859. This Act has been in existence in the town of Mirzapur, from which the case comes, for a number of years, and is so well known in the factories of Mirzapur that we need not be under any apprehension that persons who enter into contract under it are ignorant of the law or do not know the nature of the contract into which they are entering. We have examined that contract, and, in spite of what the learned Judge says, we are satisfied that it is a contract that is contemplated under Act XIII of 1859. The learned Judge has quite misunderstood the provisions of the law and also the terms of the contract, and he has needlessly gone out of his way when he says that the order of the Magistrate before him was silent as to how the balance of the advances was to be paid or how long the appellant was to work for Mr. Lucas. The contract was for a term of 50 months, and as soon as those 50 months have expired and the money advanced under the contract has been re-paid, Ramai Singh is free to enter upon any other work and in any other place that may seem good to him. What the learned Judge writes about Ramai Singh incurring the possibility, under this order of the Magistrate, of having to work for the rest of his life and yet the balance be not re-paid could only be true if Ramai Singh does not pay up the balance that may be due from him. As soon as the fifty months are over Ramai Singh can pay the balance the very next day. Till that time he must carry out the terms of the contract into which he has entered. We are most unwilling to interfere in cases of this kind, but we feel that the terms of

(1) Cr. R. 285 of 1910,

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absurd; the more so when the contract is made and breach of it occurs in a town like Cawnpore, where, unless it is proved to the contrary, every workman knows that there is a law like Act XIII of 1859 and enters into a contract voluntarily and willingly. When a man enters into a contract he must carry out the terms of the contract into which he has entered unless he can show some reasonable excuse. One of the terms of the very same contract can hardly be afterwards held up as reasonable excuse for non-performance. Let the record be returned with this expression of opinion from this Court

Record returned.

the learned Judge's judgement may be so mischievously interpreted that we are compelled to interfere. We set aside the order of the learned District Judge and we restore that of the Magistrate. It has not been shown to us that the terms of the bond are at all beyond the means of Ramai Singh.

Ramai Singh will work from the date the order of this Court is certified to the court below until he has completed fifty months of work from the date of the contract and will pay up the sum of Rs. 19-4. Until he has worked for this period and paid up this sum he will continue to be liable for work. Any period for which he worked in the past and has worked since the 6th of February, 1910, is to be deemed as work under this order and any payments made subsequent to the 6th of February, 1910, and accepted by Mr. Lucas are to be deemed as payments made in liquidation of the sum of Rs. 19-4, otherwise the order of the learned Magistrate will hold good.

APPELLATE CRIMINAL.

Before Mr. Justice Piggott.

EMPEROR v YUSUF HUSAIN.*

1918
 January, 8.

Act No I of 1872 (Indian Evidence Act), section 105—Act No. XLV of 1860 (Indian Penal Code), section 97—Right of private defence—Pleadings—Alternative and apparently inconsistent pleas

The right of an accused person to defend himself upon a criminal charge can only be limited by the provisions of the statute law.

There is nothing in the law to prevent a man on his trial on a charge of culpable homicide from setting up an alternative defence on some such lines as these:— "First, I was not present at the occurrence referred to by the prosecution witnesses, and they are giving false evidence against me; secondly, even if I fail to persuade the Court of this fact, I can show from the statements of the prosecution witnesses themselves, that if I had caused the death of any person in the manner and under the precise circumstances deposed

*Criminal Appeal No. 736 of 1917, from an order of F. D. Simpson, Sessions Judge of Allahabad, dated the 10th of September, 1917.

to by their evidence, I should have been acting in the lawful exercise of a right of private defence."

Queen-Empress v. Prag Dal (1), *Queen Empress v. Timnal* (2) and *Emperor v. Gullu* (3) refused to.

THIS was an appeal from an order of the Sessions Judge of Allahabad, convicting the appellant of an offence under section 308 of the Indian Penal Code and sentencing him to three years' rigorous imprisonment. The facts of the case are fully stated in the judgement of the Court.

Mr. *G. W. Dillon* and *Piari Lal Banerji*, for the appellant

The Government Pleader (*Babu Lalit Mohan Banerji*), for the Crown

PIGGOTT, J.:—On the 26th of June, last, in the morning, in a frequented part of the city of Allahabad, a scuffle took place between Yusuf Husain, who is appellant now before this Court, and one Musi Raza. The two men came to the ground, the appellant being underneath and Musi Raza uppermost. When the scuffle ended Musi Raza was found to be bleeding profusely from wounds in the chest. There were two distinct wounds, one of which was on the right side of the chest and the other on the left, over the region of the heart. The wound on the right side was long and superficial, and, so far as the medical evidence goes, might have been caused by the knife or other weapon which had just inflicted the wound on the left side slipping along the body. The wound on the left side was of a peculiar character and seems to have honestly puzzled the medical officers who examined it. The most remarkable feature about it was that it was angular in shape, with two distinct limbs each about three quarters of an inch long. The medical officer whose evidence appears the more reliable was of opinion that this wound had most probably been inflicted with a knife, but that both the injuries on the chest looked as if they had been caused by a single blow, the knife having slipped round after penetrating and then slid along the body in the course of a scuffle. It so happened that the wound on the left side, while dangerous, did not prove fatal. The pleural cavity was not penetrated, and though one of the minor arteries was severed and there was serious effusion of

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(1) (1898) I.L.R., 20 All., 459.

(2) (1899) I.L.R., 21 All., 122.

(3) Weekly Notes, 1904, p. 118.

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blood, at one time threatening to prove dangerous to life, the injury yielded to skilful treatment and Musi Raza recovered Yusuf Husain was committed for trial on a charge framed under section 307 of the Indian Penal Code. The learned Sessions Judge has found that Yusuf Husain stabbed Musi Raza with a knife, that he did so with intent to cause death, or at least to cause such bodily injury as he knew to be likely to result in death, but that, even if death had resulted, the case would have been covered by Exception I to section 300 of the Indian Penal Code, in that Yusuf Husain had acted under sudden and grave provocation. He has accordingly convicted the appellant under section 308 of the Indian Penal Code and has sentenced him to rigorous imprisonment for three years.

The memorandum of appeal to this Court, apart from calling in question the severity of the sentence, raises two distinct pleas. The first is whether the prosecution evidence, even if accepted at the value put upon it by the learned Sessions Judge, justifies a finding that the appellant intended to cause death or even injury likely to result in death. The other is that the appellant was acting in the lawful exercise of his right of private defence and is completely protected by the provisions of section 97 of the Indian Penal Code. On this latter point there has been considerable argument before me. With regard to the legal aspects of the case, I have been referred more particularly to three reported cases of this Court. *Queen-Empress v. Prag Dat* (1), *Queen-Empress v. Timmal* (2) and *Emperor v. Gullu* (3).

The first of these rulings seems to have only a remote bearing on the facts now before me. It lays stress upon the provisions of section 105 of the Indian Evidence Act, and there can be no doubt whatever that, if the present appellant is to secure an acquittal on the ground that he acted in the exercise of his lawful right of private defence, it must be because the court finds this affirmatively, after laying the burden of proof on the accused person. With regard to the second of these two cases, it seems to me that the head-note goes very considerably beyond anything that was decided in the case itself. The learned Judges did not

confine their consideration of that case to the fact that the right
 (1) (1898) I.L.R., 20 All., 459. (2) (1899) I. L. R., 21 All., 112.
 (3) Weekly Notes, 1904, p. 113.

of private defence had not been pleaded by the persons who case they were considering. The contention before them on behalf of the prosecution did not limit itself to this fact, but it was pleaded further "that there was no evidence on the record upon which any circumstance could be inferred which would substantiate a plea of private defence." This was the contention which found favour with the Court and upon which the case was definitely decided. There is nothing to the contrary in the third of the cases to which I have above referred. The right of an accused to defend himself upon a criminal charge can only be limited by the provisions of the statute law, and in this case the provisions to be considered are those of section 105 of the Indian Evidence Act already referred to. I cannot see anything in the law to prevent a man on his trial on a charge of homicide from setting up an alternative defence on some such lines as these :—" *Firstly*, I was not present at the occurrence referred to by the prosecution witnesses, and they are giving false evidence against me ; *secondly*, even if I fail to persuade the court of this fact, I can show from the statements of the prosecution witnesses themselves that, if I had caused the death of any person in the manner and under the precise circumstances deposed to by their evidence, I should have been acting in the lawful exercise of a right of private defence."

Now in the present case the accused has done something like this, but not precisely this. He said that he was coming along the road on his bicycle when he was set upon and assaulted by Musi Raza; that he fell off his bicycle on to the ground, and Musi Raza on the top of him, the two of them being mixed up with the bicycle, which fell to the ground at the same time. Musi Raza received his injuries in the course of this fall, and they must presumably have been caused by some portion of the bicycle. The defence as thus set up was not substantiated by the evidence. If it were necessary for me to go into the matter, I could give my reasons for concurring in the finding of the learned Sessions Judge that Musi Raza was not injured by falling on the bicycle, but that he was struck in the chest by the appellant Yusuf Husain, holding a pen-knife or some similar implement in his hand. I do not feel called upon to go into this question in detail, because the appeal has been

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argued before me, in substance, upon the admission that this was what actually happened. It is unfortunate that Yusuf Husain was not sufficiently well advised to have admitted this fact frankly in the trial court. The result has been to involve him in that necessity for arguing two inconsistent defences on which stress is laid in more than one of the rulings to which I have just referred. He endeavoured to support his position by calling a number of witnesses, and these witnesses themselves laboured under the disadvantage which the accused had imposed on the entire conduct of the defence. They gave evidence as to the circumstances under which the affray between the two men commenced, which evidence has in the main been accepted by the trial court in preference to that of the prosecution witnesses. They described Musi Raza as the aggressor, and as having set upon Yusuf Husain while the latter was riding by on his bicycle. They said that the two men fell together on the ground with Musi Raza uppermost, but there they had to stop, unless they were to give away the defence principally relied upon at the trial. None of the defence witnesses would admit that he saw Yusuf Husain strike a blow with any weapon or instrument whatsoever. They could only say that when the two men stood up Musi Raza was bleeding at the chest. The defence evidence given under these limitations can not be relied upon further than it has been by the learned Sessions Judge himself. It was not accepted even by the assessors, who would have preferred to find the accused not guilty. They were both of opinion that the injuries on Musi Raza's person were caused by a blow or blows struck by Yusuf Husain. On the principles already laid down the only question which remains is whether the plea of private defence can be made out on the evidence of the prosecution witnesses themselves. I have to criticize that evidence in connection with the other plea taken in the memorandum of appeal, and I need not anticipate those criticisms. It is sufficient for me to say that even the evidence of the witness Safdar Husain, who is certainly the most reliable of the prosecution witnesses, falls short of making out a satisfactory answer to the charge on the ground of private defence. He admits that he saw the two men struggling on the ground; that Yusuf Husain was underneath

with Musi Raza on the top of him, and that Musi Raza had his hands, one on the back of the accused's neck and one underneath it; then he says he saw two distinct blows struck by the accused, inflicting stabs on the chest of his opponent. We have no statement from Yusuf Husain himself that he was being throttled, that the pressure upon his neck was such as to inspire him with fear for his own life; in fact, we have no exposition from the accused himself of the motives for his action. On the evidence, therefore, as it stands I am not prepared to find that the right of private defence of the person in favour of Yusuf Husain, even admitting such right to have arisen in consequence of an assault commenced by Musi Raza, was not vitiated by the fact that harm was caused more than was necessary for the purposes of defence.

At the same time I think that the case comes very near the limit, and that it is at least possible that a full defence on these lines might have been made out if the appellant had been better advised at his trial. It does not seem to me at all necessary to take as serious a view of this case as has been done in the court below. The prosecution evidence is scanty to a degree. The statement of Musi Raza is corroborated by two witnesses only—Safdar Husain and a woman named Musammat Sakina. The learned Sessions Judge has distrusted the evidence of the woman, and I think it sufficient to say that the record discloses abundant grounds for putting her statement aside as altogether unreliable. The long and short of the matter is that Musi Raza elected to come into court with a version of the facts which diverges very widely from the truth as regards the origin and commencement of the affray. He found it difficult to get any witness to support his false statements on this point. The learned Sessions Judge remarks that the investigating Police Officer found it difficult to obtain evidence because the sympathies of persons in the neighbourhood seemed to be with Yusuf Husain. He does not appear to have adequately appreciated the importance of this remark. What the investigating officer found difficult to obtain was evidence supporting Musi Raza's version of the facts, and his difficulty arose simply from the fact that the shop-keepers of the neighbourhood saw no adequate

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reason for perjuring themselves to oblige Musi Raza. Their sympathy for the accused amounted to mere disinclination to see him involved in a serious charge upon a version of the facts which they knew to be in material points untrue. When a number of them finally decided to come in court as witnesses for the defence, they unfortunately thought themselves to be precluded, under the circumstances already referred to, from telling the whole truth; but their version of the commencement of the affray has been in substance accepted by the trial court. The result of this is that Musi Raza has been disbelieved by the learned Sessions Judge in very material parts of his evidence and, this being the case I do not find myself able to follow the learned Sessions Judge in accepting as established beyond reasonable doubt Musi Raza's version as to the particular manner in which he was struck by the accused. The medical evidence is not merely consistent with the assertion that only one blow was struck, but it tends to make that assertion probable. The appearance of the wounds as described by the medical officer, whose evidence I agree with the learned Sessions Judge in accepting as reliable, suggests that the theory formed by that officer as to the manner in which the injuries were caused is probably correct. I think it quite unlikely that Musi Raza is speaking the truth when he says that the superficial cut on the right side of his chest was inflicted first and was followed by a stab aimed directly at his heart. It is true that Musi Raza's statement on this point is to some extent corroborated by the evidence of Safdar Husain. The latter speaks of two distinct blows being struck, though of course he cannot say which of the two injuries was caused by which blow. In some respects Safdar Husain has shown himself an impartial witness, and I do not see that the learned Sessions Judge was in any way justified in rejecting that portion of his evidence which bears out the statements of the defence witnesses as to the position of Musi Raza's hands at the moment when the accused struck him. It must be remembered, however, that this witness is admittedly a friend of Musi Raza and that his account of the manner in which the affray commenced has been rejected by the learned Sessions Judge, who has preferred the version

given by the defence witnesses. It seems to me that to hold that Yusuf Husain struck two blows at his assailant, or even to hold that the curiously shaped injury on the left side of Musi Raza's chest was the result of a blow intentionally aimed at that portion of his anatomy, is to place an unwarranted degree of reliance on the veracity of Safdar Husain and on his opportunities of observing precisely what took place in what must have been a very brief scuffle.

In my opinion the prosecution evidence, fairly considered, so far from warranting the conclusion that when Yusuf Husain struck at Musi Raza with the pen-knife, or whatever other implement he had about his person at the time, he did so with the intention or knowledge referred to in section 299 of the Indian Penal Code, does not even justify the conclusion that the hurt which he intended to cause or knew himself likely to cause was grievous hurt, reference being made to the provisions of section 322. The offence committed, therefore, would be that made punishable by section 324 were it not for the fact that the appellant acted on grave and sudden provocation. This has been found by the learned Sessions Judge himself and I agree with him. The offence committed, therefore, must be reduced to one punishable under section 334, Indian Penal Code. The result is that I set aside the conviction and sentence in this case, convict Yusuf Husain of an offence punishable under section 334, Indian Penal Code, and sentence him to pay a fine of Rs. 100. I allow one week within which the fine may be paid, the appellant's security remaining in force till that period. In default of such payment the appellant will suffer simple imprisonment for a period of one month.

Conviction altered. Sentence reduced.

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January, 9.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir P. Madan
Chawan Banerji

MUHAMMAD ISHAQ KHAN AND OTHERS (PLAINTIFFS) v MUHAMMAD
RUSTAM ALI KHAN AND ANOTHER (DEFENDANTS) AND THE COLLEC-
TOR OF MUZAFFARNAGAR (PLAINTIFF)*

*Civil Procedure Code (1908), section 11. Explanation V, order XX, rule 12—
Suit for possession and mesne profits—Decree silent regarding future mesne
profits—Fresh suit for such profits not barred.*

The plaintiff claimed possession of immovable property and mesne profits to the date of suit, also mesne profits *pendente lite* and subsequent to decree. The court gave a decree for mesne profits to the date of suit, but the decree was silent as to mesne profits *pendente lite* or subsequent to decree.

Held, on suit by the plaintiff for further mesne profits to the date of his obtaining possession, that there was nothing in the present Code of Civil Procedure of 1908, any more than in the former Code of 1882, to bar such a suit.

Ram Dayal v. Madan Mohan Lal (1) followed *Do anwami Ayyar v. T. Subramania Ayyar* (2) referred to.

THE plaintiffs were trustees under a *wagfnamah* executed by Nawab Muhammad Azmat Ali Khan of Karnal. On the death of the Nawab in 1908 the defendants, his step brothers, entered into possession of the *wagf* properties. The plaintiffs instituted a suit against the defendants in 1912 for enforcement of the *wagf* and possession of the *wagf* properties. In the plaint the plaintiffs prayed for a decree for possession, and for the sum of Rs. 81,034-9 as past mesne profits. They also claimed *pendente lite* and future mesne profits till delivery of possession. The suit was after contest decreed by the court of first instance (the Additional Subordinate Judge of Meerut), and the decree was, on appeal, confirmed by the High Court. [For the judgement of the High Court see *Rustam Ali Khan v. Mushtak Husain* (3)]. The issue relating to mesne profits framed by the Subordinate Judge was as follows:—"Are the plaintiffs entitled to *wasilat*? If so, to what amount?" The court found that "Rs. 65,390-6-5 is the total of the profits for three years." The operative portion of the judgement ran as follows:—"Ordered, that plaintiffs' claim for possession as trustees be decreed as

* First Appeal No. 3 of 1917, from a decree of Man Mohan Sanyal, Additional Subordinate Judge of Meerut, dated the 30th of August, 1916.
1899 I. L. R., 21 All., 425. (2) (1917) I. L. R., 41 Mad., 188.
(3) (1916) 14 A. L. J., 554.

prayed. The claim about the *wasilat* up to the date of suit is decreed to the extent of Rs. 57,564, and also for Rs. 1,227-4-4, amount of cash deposit. Remainder of the *wasilat* and cash profits in deposit being not proved, claim about it is dismissed." The decree as drawn agreed with the judgement. The plaintiffs instituted the present suit to recover mesne profits from the date of the institution of the first suit till the date of delivery of possession by the defendants to the receiver appointed by the High Court. The defendants contended, *inter alia*, that mesne profits now in suit having been expressly claimed in the former suit and refused, the claim was *res judicata* and was, under section 11 of the Code of Civil Procedure unsustainable. The lower court gave effect to this plea and dismissed the suit.

The Hon'ble Dr. Tej Bahadur Sapru (with him Pandit Kailas Nath Katju and Maulvi Sheikh Abdullah), for the appellants, contended that the suit was maintainable and the claim as to future mesne profits not having been tried at all in the earlier suit, section 11 did not apply. The plaintiff could not in that suit claim any decree for *pendente lite* and future mesne profits as a matter of right, no cause of action having arisen for the same at the date of the institution of that suit. It was entirely in the discretion of the court to grant or to refuse relief as to future mesne profits. Non-exercise of the discretion in the plaintiff's favour would not take away his right to future mesne profits when they actually become due; *Ram Dayal v. Madan Mohan Lal* (1) and *Man Mohun Sirkar v. The Secretary of State for India in Council* (2). The lower court is of opinion that by reason of some change in arrangement and phraseology there had been a change in the law and the decisions under the old Code were no longer good law. This was not so. The language of sections 211 and 212 of the Old Code and order XX, rule 12, of the present Code was substantially the same, and the two sections in the Old Code had now been amalgamated into one. It was a well-settled principle of construction that the Legislature was presumed to know not only the general principles of law but the construction which the courts had put upon particular Statutes, and where a section of an Act

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(1) (1899) I. L. R., 21 All., 425. (2) (1890) I. L. R., 17 Cal., 968.

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which had received a judicial construction was re-enacted in the same words, such reenactment must be treated as a legislative recognition of the construction; *Ex parte Campbell* (1). If the Legislature had intended to overrule the unanimous decisions of all the High Courts on the point, it would have done so by the use of clear and apt language and not indirectly and by mere implication. Under the present Code all matters and inquiries relating to mesne profits were to be decided in the suit itself and could not be relegated to the execution department. In that view the retention of clauses (1) and (2) and the proviso to section 244 of the Code of 1882 had become useless, and consequently no similar provisions were to be found in section 47 of the present Code, which had been entirely recast. The insertion of the proviso to section 244 of the old Code under section 47 of the present Code, would have been entirely meaningless and out of place, and its omission therefore did not at all imply that a separate suit for future profits not dealt with by the decree would no longer lie. Reports of select committees were not admissible on questions of construction of statutes, and the lower court ought not to have referred to the report of 1903. But even if the report were looked at, it would favour the plaintiff's argument. The report of 1903 referred to by the lower court was appended to a bill which contained an express clause purporting to change the law and to overrule the previous decisions. But that bill had been withdrawn and in the report to the bill which was subsequently introduced and passed, there was no indication that any change in the law in that direction was ever contemplated, the lower court had relied upon the decision of the Madras High Court in *Ramasami Iyer v. Srirangaraja Iyengar* (2) but that case had been subsequently overruled by a Full Bench of the Madras High Court; *Doraiswami Ayyar v. T. Subramania Ayyar* (3).

The Hon'ble Sir *Sundar Lal* (with him Mr. *A. E. Ryves*), for the respondents, submitted that, if it were open to him, he was prepared to argue that the case of *Ram Dayal v. Madan Mohan Lal* (4) had been wrongly decided. But if that decision

(1) (1870) 5 Ch. App., 703.

(3) (1917) I. L. R., 41 Mad., 188.

(2) (1914) 26 Indian Cases, 622.

(4) (1899) I. L. R., 21 All., 425.

was one by which the Court was bound, it was submitted that there had been a change in the law, and by the amalgamation of old sections 211 and 212 in one section in the present Code the Legislature had intended to place claims to all mesne profits (whether past or future) on an equal footing. The cause of action for recovery of immovable property and its rents and mesne profits was one and indivisible, and the plaintiff having once claimed mesne profits, could not bring a fresh suit for the same purpose. On a proper construction of order XX, rule 12, he could have insisted for a decree for future mesne profits. The omission of any provision in the present Code corresponding to the proviso to section 244 of the old Code was most significant and indicated that Explanation V, appended to section 11 of the present Code, would fully apply to the present case. He referred to section 34 of the present Code.

Pandit *Kailas Nath Katju*, in reply, submitted that causes of action for recovery of immovable property and for its mesne profits were separate and distinct; *Nandan Singh v. Ganga Prasad* (1).

RICHARDS, C.J., and BANERJI, J. :—This appeal arises out of a suit for mesne profits. A previous suit had been brought in which possession of the land had been claimed. A certain sum was also claimed as mesne profits for the period prior to the institution of the suit. There was a further claim for mesne profits during the pendency of the suit and after decree. The suit resulted in a decree for the plaintiffs for possession of the land and also a decree for a portion of the amount claimed by the plaintiffs for mesne profits. The rest of the plaintiff's claim was dismissed. On referring to the judgment it is quite clear that the court never dealt or purported to deal with the mesne profits during the pendency of the suit or after decree. In the present suit mesne profits are claimed from the date of the institution of the suit up to the date of delivery of possession. The defence is that the decree in the previous suit operates as *res judicata*, and reliance is placed upon the provisions of section 11, Explanation V. Section 11 provides that "No court shall try any suit or issue in which the matter directly and substantially in issue has been

(1) (1918) I. L. R., 35 All., 512 (517).

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directly and substantially in issue in a former suit between the same parties . . . in a court competent to try such subsequent suit." Explanation V provides that "Any relief claimed in the plaint which is not expressly granted by the decree shall for the purposes of this section be deemed to have been refused." This explanation corresponds exactly with Explanation III of section 13 of the old Code. Reliance is also placed upon the provisions of order II, rule 2, which provides that "Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action." The contention on behalf of the defendants is that the court in the previous suit not having granted mesne profits during the pendency of the suit and from the date of the decree up to the date of delivery of possession must be deemed to have refused it. Further, the decree ought to be interpreted as having expressly dismissed the suit in respect of mesne profits save to the extent that mesne profits were granted. The very same question had frequently arisen in the High Courts in India before the coming into operation of the present Code of Civil Procedure. All the courts appear to have held that, notwithstanding the provisions of the old Code, a suit for mesne profits *pendente lite* and from the date of the decree to delivery of possession could be maintained. This was expressly held in the case of *Ram Dayal v. Madan Mohan Lal* (1). In that case, just like the present, there had been in a previous suit a claim for mesne profits prior to the institution of the suit and also future mesne profits. Nevertheless the court held that the subsequent suit for mesne profits from the date of the institution of the suit up to delivery of possession could be maintained when the court in the previous suit had not decided the right of plaintiff to these mesne profits. We think that we are bound to follow this decision, unless it is shown that the Legislature, when enacting the present Code of Civil Procedure, altered the law. It is a recognized rule that where there have been decided cases before an Act is amended, if the amendment does not expressly show that the law as interpreted by the decisions is altered, the rule laid down by the decisions, is to be adhered to.

(1) (1899) I. L. R., 21 All., 425.

We now propose to consider whether the provisions of the Code of Civil Procedure of 1908 altered the law in respect of the matter with which we are dealing. Section 211 of the Code of Civil Procedure of 1882 provided that in a "suit for the recovery of possession of immovable property yielding rent or other profits the court may provide in the decree for the payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree was made."

It is to be noted that in this section there is no reference to a *claim* in the plaint being made for mesne profits. Section 212 provided that where the suit was a suit for "possession of immovable property and for mesne profits which have accrued on the property during the period prior to the institution of the suit and the amount of such profits is disputed, the court may either determine the amount by the decree itself or may pass a decree for the property and direct an inquiry into the amount of mesne profits and dispose of the same on further orders."

The provisions of these two sections seem to have been amalgamated in the provisions of order XX, rule 12, of the new Code. That order provides that "where there is a suit for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree (a) for possession of the property, (b) for the rent or mesne profits which have accrued on the property during the period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits, and (c) directing an inquiry as to the rent or mesne profits from the institution of the suit until (i) the delivery of possession to the decree-holder, (ii) the relinquishment of possession by the judgment-debtor with the notice to the decree-holder through the court, or (iii) the expiration of three years from the date of the decree whichever event first happens." Clause (2) of this rule provides "where an inquiry is directed under clause (b) or clause (c) a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of the inquiry."

Under the old Code the practice was that, excepting those cases in which the court had actually found a certain amount due for mesne profits, the court executing the decree used to be called

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upon to make an inquiry and to ascertain in execution the amount of mesne profits, whether they were mesne profits which had accrued prior to the institution of the suit or mesne profits which had accrued between that date and the delivery of possession. The authority to make this inquiry was conferred on the court executing the decree by section 244 of the Code of Civil Procedure of 1882, to which we shall presently refer. It would seem, therefore, that the only substantial change that has been made in the law is that it is the court which hears the suit which is to ascertain the mesne profits, whether those mesne profits be mesne profits which accrued before the institution of the suit or afterwards up to date of delivery of possession, and it is this court which is to make the *final* decree for mesne profits which has to be executed by the court executing the decree. We do not think that any significance is to be attached to the fact that in section 211 of the old Code there is no reference to a claim for mesne profits or to the fact that order XX, rule 12, purports to deal with suits in which mesne profits are claimed. Section 244 of the old Code dealt with certain matters which were to be determined by the court executing the decree and not by a separate suit, and amongst other questions the very first mentioned were questions regarding the amount of any mesne profits as to which the decree had directed an inquiry. There is a *proviso* at the end of the section in the following words:—"Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein where such profits are not dealt with by such decree." The corresponding section of the Code of 1908 is section 47. In this section reference to all questions of mesne profits is omitted and the *proviso* which we have quoted from section 244 is also omitted. The argument is that this last mentioned omission is most significant and that it demonstrates the intention of the Legislature, that suits for the recovery of mesne profits after a previous suit for possession cannot be maintained. A little consideration shows that this argument is not so forcible as might appear at first sight. The *proviso* to section 244 of the old Code seems to have presumed that there was nothing in the Code itself which would prevent a second suit for mesne profits,

but that it might be contended that the provisions of section 244 would preclude a second suit, and accordingly the words of the *proviso* are not that nothing "in the Code" shall be deemed to bar a separate suit for mesne profits, but that nothing "in the section" shall be deemed to bar such a suit. It becomes apparent that the retention of this *proviso* in the new Code would have been altogether meaningless and out of place, because in section 47 of the new Code there is no reference to inquiries as to mesne profits at all, and order XX, rule 12, to which we have already referred, expressly takes away the jurisdiction of the court executing the decree to make any inquiry in respect of mesne profits. The learned Judge in the court below has referred to the report of the select committee on the provisions of the contemplated amendment of the Code of Civil Procedure. If it were permissible to consider the report at all, the inference would seem to be rather against the respondents than in their favour. The quotation had reference to a Bill which was subsequently withdrawn. In this Bill there was a provision which would have made it quite clear that a second suit for mesne profits could not be maintained. This provision does not find a place in the measure which was actually enacted. If any legitimate inference could be drawn at all, it would seem as if the Legislature, knowing well the course of decisions in the Courts in India had come to conclusion that it was best to maintain the rule of law as established by the cases. In this connection it may not be altogether out of place to suggest that there are some practical difficulties in the way of ascertaining mesne profits *pendente lite* and particularly future mesne profits in the original suit. Where there are more defendants than one, their liability may not be altogether the same, and the final ascertainment of the amount due for mesne profits from the date of the decree to the time of delivery of possession can never be made until possession is actually taken by relinquishment on the part of the defendants or through the court. We may mention here that the question recently arose in the Madras High Court in the case of *Doraiswami Ayyar v. T. Subramania Ayyar* (1), in which the majority of a Full Bench of that Court were of opinion that, notwithstanding the provisions of the new Code, a suit for mesne profits like the present could be maintained.

(1) (1917) I. L. R., 41 Mad., 188.

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We allow the appeal, set aside the decree of court below and remand the case to that court with directions to re-admit the suit in its original number and to proceed to hear and determine the same according to law. The appellants will have their costs of this appeal. Other costs will follow the event.

Appeal decreed and cause remanded.

Before Mr. Justice Piggott and Mr. Justice Walsh.

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January, 10.

JAGARDEO SINGH (DEFENDANT) v ALI HAMMAD AND OTHERS
(PLAINTIFFS) *

Act (Local) No II of 1901 (Agra Tenancy Act), section 94—Person occupying land without consent of landlord—Ejectment—Non-occupancy tenant—Usufructuary mortgagee entitled to possession.

The plaintiffs were the usufructuary mortgagees entitled to possession of the mortgaged property. The defendant having acquired a part of the equity of redemption asserted a right to the possession of some of the *sir* lands comprised in the mortgage without tendering the mortgage money, and somehow managed to get into possession of certain plots.

Held, that section 94 of the Agra Tenancy Act, 1901, applied, and the defendant could be regarded as a person in possession of land without the consent of the landlord and ejected as if he were a non-occupancy tenant. *Bali v. Naubat Singh* (1) followed.

UNDER a usufructuary mortgage executed before the present Tenancy Act came into force the plaintiffs were in possession of certain plots of *sir* land as mortgagees. The defendant acquired a share in the mahal in which the plots were situate and thus became the owner of a portion of the equity of redemption. Subsequently the defendant took possession of some of the plots of *sir* land. The plaintiffs sued in the Revenue Court for ejectment of the defendant as a non-occupancy tenant. The defendant pleaded that there was no contract of tenancy between the parties and that he was in proprietary possession as a co-sharer in the mahal. The Revenue Court, acting under section 199 (1) (a) of the Tenancy Act, referred the defendant to the Civil Court. The final decision of the Civil Court was to the effect that these plaintiffs were entitled to exclusive possession of the plots as usufructuary mortgagees, and that the defendant

* Second Appeal No. 118 of 1915, from a decree of Durga Dat Joshi, District Judge of Azamgarh, dated the 9th of December, 1914, confirming a decree of Govind Atma Ram Dhandi, Assistant Collector, first class, of Mohammadaabad, dated the 18th of July, 1914.

(1) (1912) 9 A. L. J., 771.

by becoming a co-sharer in the mahal had acquired a share in the equity of redemption. Following this decision the Assistant Collector decreed the ejectment suit on the ground that the status of the defendant could only be deemed to be that of a non-occupancy tenant. The defendant appealed to the Commissioner, who held that a question of proprietary title was still in issue between the parties and that the appeal lay to the District Judge. The defendant then appealed to the District Judge, who held that no such question was any longer open between the parties, as it had been finally determined by the Civil Court, and that the appeal therefore did not lie to him. Against this decision the defendant appealed to High Court. After some of the facts stated above had been found upon a remand by the single Judge who first heard the appeal, the case was referred by him to a Division Bench.

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Maulvi Iqbal Ahmad, for the appellant :—

The District Judge was wrong in holding that the appeal did not lie to him. The finding of the Assistant Collector that the defendant was a non-occupancy tenant of the plaintiffs was challenged in the appeal on the ground that the defendant was a proprietor and nobody's tenant. So, a question of proprietary title was still a matter in issue in the appeal, and under section 177(e) of the Tenancy Act the appeal lay to the District Judge. The plaintiffs came to the Revenue Court on the allegation that the defendant was their tenant. Upon the facts ascertained, the defendant is not their tenant. Taking it that he is a trespasser without title, the plaintiffs cannot in this suit turn round and claim to eject him as a trespasser. The Revenue Court cannot entertain a suit to eject a mere trespasser. The plaintiffs came to court with wrong allegations and they have themselves to thank if after a protracted trial they find that the suit must be dismissed. If in the present case the suit were decreed on the ground that the defendant was a trespasser, the result would be that zamindars need never go to the Civil Court to eject trespassers pure and simple; they would sue in the Revenue Court on an allegation of tenancy, and when the allegation was found against them, would claim a decree on the ground that the defendant was

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a trespasser. The jurisdiction of the Civil Court would thereby be effectively ousted. It is significant that the court fee payable for a suit under section 58 of the Tenancy Act is different from that for a suit in the Civil Court for ejectment of a trespasser. In the case of *Balmakund v. Dalu* (1) the suit was instituted in a court which could properly pass a decree for ejectment on the facts *as found*. The difficulty in the present case is that the Revenue Court was not the proper court to eject a mere trespasser; the suit should have been brought in the Civil Court. Sections 196 and 197 of the Tenancy Act apply only to cases in which the appeal would in any event lie to the District Judge, although the suit was instituted in the wrong court. They are not applicable here, for an appeal from a suit under section 58 of the Tenancy Act ordinarily lies to the Commissioner; *Bechu Sahu v. Nandram Das* (2).

MR. S. M. YUSUF HASAN, for the respondents:—

On the facts found it is clear that the defendant has no right to remain in possession of the plots in dispute. Apart from technicalities, that is the real question between the parties, namely, whether the defendant should be ejected, and that has to be determined by the Court now. The defendant is a mere trespasser, and the Civil Court has an inherent jurisdiction, notwithstanding technicalities and formal defects, if any, in the suit as instituted, to pass a decree for ejectment in accordance with the rights of the parties. Sections 151 and 153 of the Code of Civil Procedure are intended to meet the requirements of a case like the present, and give very wide powers. If the court now decreed the defendant's ejectment, he could have no ground for saying that he had been taken by surprise or been prejudiced in any way. For, in the civil suit between the parties, which was instituted in accordance with section 199 (1) (a) of the Tenancy Act, the defendant had an ample opportunity of raising all the pleas which he could possibly have raised by way of defence if the plaintiff had originally sued for ejectment in the Civil Court. Technically, also, there is nothing against the passing of a decree for ejectment in the present suit as brought. It has been held that the provisions of section 34 of the Tenancy Act point to the

(1) (1903) L. L. R., 25 AL., 498.

(2) (1914) 12 A. L. J., 902.

conclusion that a trespasser who is in cultivatory occupation of land without the consent of the zamindar can be ejected by the Revenue Court as a non-occupancy tenant; *Balli v. Naubat Singh* (1).

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Maulvi *Iqbal Ahmad*, in reply :—

Sections 151 and 153 of the Code of Civil Procedure do not apply to suits instituted in the Revenue Courts; vide section 193 of the Tenancy Act. The case relied on by the respondents was not correctly decided. Section 34 finds a place in Chapter IV of the Tenancy Act, which chapter deals only with "determination, etc" of rent; there is no corresponding provision in chapter V, which is the chapter dealing with ejectment by the Revenue Courts. That shows that the Legislature intended that, though a trespasser could be sued in the Revenue Court for rent he could not be ejected by that court. Sections 57 and 58 of the Tenancy Act are exhaustive of the grounds on which a person can be ejected by the Revenue Court, and a trespasser does not come within those sections. The latter portion of section 34 emphasizes that a trespasser does not become a tenant until he pays rent. The Full Bench case of *Nandan Singh v. Ganga Prasad* (2) considered the provisions of section 34 and doubted whether the Revenue Court could eject unless the relationship of landlord and tenant existed between the parties.

PIGGOTT, J. :—These are four connected appeals which have come before us under the following circumstances :—

The plaintiffs instituted, in the court of the Assistant Collector, Azamgarh, four suits, for the ejectment of the defendant from certain specified plots of land, in each case with the allegation that they themselves were mortgagees in possession of the proprietary rights over the said plots, and the defendant was a non-occupancy tenant of the same. The defendant replied that there was no contract of tenancy between himself and the plaintiffs; that his possession was proprietary in its nature and that he was in possession as of right, because he was a co-sharer in the proprietary rights of the particular sub-division of a *mahal* to which the land in suit appertained. On this the learned Assistant Collector took action under section 199 of Act II of 1901, requiring the defendant to file a suit in the

(1) (1912) 9 A L J, 771.

(2) (1918) I. L. R., 35 ALL, 512.

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Civil Court for the determination of the question of title in issue between himself and the plaintiffs. The court of first instance determined the question in favour of the present defendant, who was, of course, the plaintiff in the Civil Court. On appeal, however, this decision was reversed. The controversy in this case has been very largely as to the meaning and effect of the appellate court's decision in this litigation. The decision, fairly considered, amounts to this, that the plaintiffs respondents (the defendants in the Civil Court) held a usufructuary mortgage in respect of the plots of land in suit and were entitled to the exclusive possession of the same as such mortgagees; but the present defendant had acquired a share in the proprietary rights, that is to say, in the equity of redemption, in respect of the mortgage held by the opposite party. The case came again before the Assistant Collector, who was bound to dispose of the ejectment suit then pending before him in accordance with the final decision of the Civil Court. He passed a brief order to the effect that in view of the decision of the Civil Court, the defendant could only be regarded as in possession of the land in suit as a sub-tenant, that is to say, a non-occupancy tenant (the land in question being *sir* land) from the plaintiffs. He ordered the defendant to be ejected accordingly. The defendant filed an appeal in the Commissioner's court, who refused to entertain it, holding that a question of proprietary title was still in issue as between the parties. The defendant then went before the District Judge in appeal, who dismissed the appeal, holding that the question of proprietary title, originally in issue, had been finally and completely disposed of in the suit already referred to, and that there was no question left for determination in the case which was not exclusively cognizable by the Revenue Courts. Against this decision four second appeals have been filed. When the case originally came up for hearing, the facts were not as clear as they are now, and an order was passed directing the District Judge to entertain the defendant's appeal and to determine certain issues of fact.

We have now before us the findings arrived at by the District Judge on the issues remanded, and as a matter of fact his findings proceed on admissions made by the parties. The mortgage under

which the present plaintiffs respondents now hold, and have been holding since 1902, was a mortgage of the specific plots of *sir* land which are now in suit. The mortgage itself had been contracted prior to the passing of the present Tenancy Act; so no question of ex-proprietary rights arises. On the terms of the mortgage, the plaintiffs, as transferees of the mortgagee rights, were entitled from 1902 and onwards to actual possession and enjoyment in respect of the land in suit.

The defendant, having acquired a part of the equity of redemption, asserted a right to take possession of some of the *sir* lands, without tendering the mortgage money. In prosecution of this claim he somehow succeeded in obtaining possession of the plots of land now in suit. The question specifically raised by these appeals is whether the learned District Judge was right or wrong in holding that no appeal lay to his court. I should be prepared to hold that that decision was correct, but the matter has now gone somewhat further. After the order of remand and the ascertainment of the facts, the real question before us is whether the Assistant Collector was right in ordering ejectment of the appellant. On the principles laid down by a learned Judge of this Court in *Balli v Naubat Singh* (1), the Assistant Collector was clearly right. It has been suggested, on the other side, that this decision was doubted in a Full Bench decision of this Court, in the later case of *Nandan Singh v. Ganga Prasad* (2) (See specially the remarks at page 516). As a matter of fact the decision reported in 9 A. L. J., page 771, was not specifically considered or in terms overruled, though it is open for the appellant to contend that the remarks of the learned Chief Justice, when delivering the judgement of the Full Bench suggest that he was not prepared to accept the correctness of that ruling. We find, however, that the principle laid down in *Balli v. Naubat Singh* (1) has been in substance accepted and followed by the Revenue Court since that decision was pronounced. Reference may be made to the notes by Mr. M. L. Agarwala in his valuable commentary on the N.-W. P. Tenancy Act, fifth edition, at pages 40 *et seqq.*, of that edition. Moreover, there is a decision of the Board of Revenue, *Champa*

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(1) (1915) 9 A. L. J., 771.

(2) (1918) I. L. R., 35 All., 512 (516).

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Kuar v. Pati Ram (1), which deals with the position of a squatter occupying agricultural land for cultivating purposes, and which adopts the principle of the case of *Balli v. Naubat Singh* (2) to its fullest extent. In this state of authorities I should be prepared personally to stand by the reported decisions directly bearing on the question before us. Moreover, I think that, there being nothing in favour of the defendant on the merits, it is not incumbent on us to go out of our way to insist upon any legal technicalities for the sake of enabling the defendant to prolong this litigation. The decision in the case of *Champa Kuar v. Pati Ram* (1) is by the Senior Member of the present Board of Revenue; and it is quite clear that if the defendant had got what he asked for, namely, a reconsideration of the Assistant Collector's order by the higher Revenue Courts, the result would have been to affirm his ejection.

So far as the Civil Courts are concerned they have already decided in favour of the plaintiffs respondents, and, if the present matter could rightly be taken cognizance of by the Civil Courts, they could not have come to a different decision from that arrived at by the Assistant Collector.

The defendant's possession is wholly unlawful, and the order of ejection a proper order on the merits. There are thus abundant reasons for dismissing these appeals.

WALSH, J.—I agree. Particularly I accept the cases of *Balli v. Naubat* (2) and *Champa Kuar v. Pati Ram* (1) as the correct expression of the law. I am not satisfied that in *Nandan Singh v. Gangu Prasad* (3) the Full Bench intended to dissent from the case of *Balli v. Naubat* (2), which was relied on by the appellant, who succeeded; but I think the *dutum* at the foot of page 515 in 35 All., requires further consideration. Apparently the Chief Justice thought that section 34 of Act II of 1901 could be made to work so long as the person was occupying the land "without permission" of the landlord. The words in the section are not "without permission." I am satisfied that the words "a person occupying land without the consent of the landlord" mean one who enters into occupation without express consent or without any previous arrangement with him.

(1) (1915) 33 Indian Cases, 70.

(2) (1912) 9 A. L. J., 771.

(3) (1913) 1 L. R., 35 All., 512.

Two reasons seemed to me very strong to show this. If section 34 can be worked only against a person who having entered as a trespasser continues in possession "without permission" of the landlord, it is difficult to see how the landlord is to get rent from a person who remains in possession with his permission. Secondly, such a person is said by the section not to be deemed to hold the land within the meaning of section 11 of the Agra Tenancy Act until he begins to pay rent. Section 11 deals only with tenants, and, I cannot see how such a person could be deemed to be a tenant within section 11 so as to make it necessary for the Legislature to exclude him from the operation of section 11 unless he was occupying with the permission of the landlord. I think this consideration lends additional weight to the view of Sir GEORGE KNOX and of the Senior Member of the Board and I agree with my learned brother that the defendant is liable to be ejected by the Revenue Courts.

BY THE COURT :—We dismiss this appeal with costs.

Appeal dismissed.

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REVISIONAL CRIMINAL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

EMPEROR v. RAM DAS *

Criminal Procedure Code, section 350—Procedure—Jurisdiction—Magistrate ceasing to have jurisdiction by reason of the transfer of a case pending before him to another court—Evidence not necessarily to be re-heard

Section 350 of the Criminal Procedure Code applies as much to cases in which a Magistrate ceases to exercise jurisdiction so far as the particular case in question is concerned by reason of its transfer to another court as to cases in which the Magistrate ceases to exercise jurisdiction by reason of his own death or transfer to another post.

Mohesh Chandra Saha v. Emperor (1), *Kudrutulla v. Emperor* (2) and *Palamandy Goundan v. Emperor* (3) followed.

THE facts of this case were as follows :—

One Ram Das was charged with an offence under section 323, Indian Penal Code, and tried by an Honorary Magistrate exercising second class powers. After the whole of the prosecution

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* Criminal Reference No 977 of 1917.

(1) (1908) L.L. R., 35 Cal., 467. (2) (1912) L.L. R., 39 Cal., 781.

(3) (1908) L. L. R., 32 Mad., 218.

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evidence and a portion of the defence evidence had been recorded, Ram Das applied to the District Magistrate to have the case transferred to some other court, and gave an undertaking that he would not ask for the re-hearing of the entire evidence *de novo*, but would be satisfied if the court to which the case might be transferred proceeded to hear the rest of the defence evidence and to pronounce judgement on the whole of the record before it. The District Magistrate transferred the case to the court of a Deputy Magistrate of the First Class and directed him to proceed with the trial from the stage to which it had reached in the court of the Honorary Magistrate. Ram Das abided by his undertaking; and the Deputy Magistrate, after taking the remaining evidence for the defence, convicted Ram Das under section 323, Indian Penal Code, and sentenced him to one month's rigorous imprisonment. The Sessions Judge before whom the matter came in revision, referred the case to the High Court under section 438, Criminal Procedure Code, with a recommendation that the conviction be quashed as illegal.

Babu *Piari Lal Banerji*, (with him Babu *Krishnarao Narain Laghate*, Munshi *Janki Prasad* and Munshi *Kamla Kant Varma*) for the applicant:—

It is a well-recognized principle of Criminal law that a Judge or Magistrate can convict only on evidence heard by himself. Except in so far as this principle is modified by Statute, a judge or magistrate has no jurisdiction to act upon evidence a part of which only has been recorded by himself and another part by another officer. And, except where the law expressly sanctions waiver, no consent or undertaking given by the accused in respect of an illegal procedure can confer jurisdiction; his rights are not lost by reason of his consent; *King-Emperor v. Sakharam Pandurang* (1), *The Deputy Legal Remembrancer etc., v. Upendra Kumar Ghose* (2). The only modification of the principle mentioned above is to be found in section 350 of the Code of Criminal Procedure, and the question is as to the true scope of that section. That section applies only to cases where there is a change in the *personnel* of the court, or *forum*, which remains the same; it does not apply where a case is transferred from one

(1) (1901) 1 L. R., 26 Bom., 50.

(2) (1906) 12 C. W. N., 140.

court to another. If the case itself remains where it was, but the individual Magistrate is succeeded by another incumbent of the same post, section 350 applies. But if the Magistrates remain where they were, and the case itself is removed from one court to another, the section does not apply. This construction of the section was accepted in the following cases; *Queen-Empress v. Radhe* (1), *Queen-Empress v. Angnu* (2), *Queen-Empress v. Bashir Khan* (3) and *The Deputy Legal Remembrancer etc., v. Upendra Kumar Ghose* (4). A different view was taken in the recent case of *King-Emperor v. Nanhua* (5). That case, however, as well as one of the cases which it followed, namely *Palaniandy Goundan v. Emperor* (6), were distinguishable on the ground that there the proceedings in respect of which the question arose were only preliminary inquiries and not regular trials. The decisions in those cases not only recognized, but were influenced by, that distinction. In the case of an "inquiry" no consideration of possible prejudice to the accused can arise, and the matter stands on an entirely different footing from that of a trial. The cases of *Mohesh Chandra Saha v. Emperor* (7) and *Kudrutulla v. Emperor* (8) are at variance with the former case, already cited, in 12 C. W. N., 140. In the second of these cases, the cross-examination of the witnesses for the prosecution, as well as the whole of the evidence for the defence, were heard by the Magistrate who convicted the accused; so, there could be no prejudice. In the present case the question of prejudice may fairly be said to arise. The order of transfer required the Magistrate to whose court the case was transferred to hear the remaining witnesses for the defence, without giving him any option to re-hear the witnesses who had been heard by the other Magistrate. There was no room left for the accused to exercise his privilege if he wanted to, and the discretion of the Magistrate was absolutely fettered. There was only the 'anticipatory' consent which had been given by the accused before his right of option had even accrued. A plea was also taken as to the severity of the sentence.

(1) (1889) I. L. R., 12 All., 66.

(2) Weekly Notes, 1889, p., 130.

(3) (1892) I. L. R., 14 All., 346.

(4) (1906) 12 C. W. N., 140.

(5) (1914) I. L. R., 36 All., 315.

(6) (1908) I. L. R., 32 Mad., 218.

(7) (1908) I. L. R., 35 Calc., 457.

(8) (1912) I. L. R., 39 Calc., 781.

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Pandit *Uma Shankar Bajpai*, for the opposite party, was not called upon.

PIGGOTT, J.—The case before us is a reference by the learned Sessions Judge of Ghazipur, recommending that the conviction of one Ram Das on a charge under section 323 of the Indian Penal Code and the sentence of rigorous imprisonment for one month passed on him be set aside, on the ground that the trial in the Magistrate's court was vitiated by illegality. It appears that the complaint filed against Ram Das was referred for trial to the court of an Honorary Magistrate, exercising the powers of a Magistrate of the second class. This court recorded the whole of the evidence for the prosecution and a portion of the evidence for the defence. When it had reached this stage, Ram Das applied to the District Magistrate to have the case transferred to some other court. He gave an undertaking that, in the event of such transfer, he would not ask the court to which the transfer was made to re-hear the entire evidence *de novo*, but would be satisfied if that court proceeded to call and examine the remainder of the defence witnesses and pronounce judgement on the materials then before it. The case was then transferred by the District Magistrate to the court of a stipendiary Magistrate of the first class. Ram Das made no attempt to evade the undertaking which he had given to the District Magistrate; that is to say, he did not demand that the witnesses, or any of them, who had been already examined by the original trial court should be re-summoned and re-heard. The first class Magistrate accordingly heard and examined the remainder of the defence witnesses named on behalf of Ram Das, convicted him on the charge as framed under section 323 of the Indian Penal Code and sentenced him to rigorous imprisonment for one month. The learned Sessions Judge has referred the case to this Court on the ground that the provisions of section 350 of the Criminal Procedure Code do not apply to cases which are transferred from one court to another, and that the first class Magistrate on receiving this case for trial was bound to commence the trial *de novo* by the examination of all the prosecution witnesses. There is authority for this proposition in one single case of this Court, *Queen-Empress*

v. *Angnu* (1). That case was decided by a single Judge upon a reference by a Sessions Judge. The case was not argued, and the judgement is of the briefest. We can only take it that in the opinion of the learned Judge of this Court who disposed of that reference the provisions of section 350 of the Criminal Procedure Code were not intended to apply to cases of transfer. There was a suggestion in the referring order in that case that the accused had been prejudiced by the course adopted. Apparently there had been some complaint on his part against the manner in which the evidence had been recorded by the original trial court. We do not know how far the learned Judge of this Court was affected by this consideration in passing the order which he did. The learned Sessions Judge has referred to another decision of this Court, *Queen-Empress v. Bashir Khan* (2). He is entitled to rely upon the opinion, expressed by the learned Judge who disposed of this case, by way of *obiter dictum*; but the actual point for decision was different. On the facts of that case, even assuming that the provisions of section 350, Criminal Procedure Code, did apply, those provisions had been contravened and the order quashing the proceeding, was obviously right on this ground alone. In a recent case, *Emperor v. Nanhua* (3), one of us has committed himself to a contrary view. Some stress was laid in deciding that case on the fact that the proceedings transferred from one court to another were only an inquiry preliminary to commitment, and no doubt the question of possible prejudice to the accused person would require to be more carefully considered in the case of the transfer of a trial than in the case of an inquiry preliminary to commitment. At the same time it is quite clear that either the provisions of section 350, Criminal Procedure Code, do not apply at all to cases of transfer, or they apply to trials just as much as to preliminary inquiries. This decision is based on certain recent pronouncements of the Calcutta and Madras High Courts. It is sufficient to refer to the cases of *Mohesh Chandra Saha v. Emperor* (4), *Kudrutulla v. Emperor* (5) and *Palaniandy Goundan v. Emperor* (6). The last of these cases was also a case of an inquiry preliminary to commitment; but in this case,

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(1) Weekly Notes, 1889, p. 130

(2) (1892) I L. R. 14 All, 346.

(3) (1914) I L. R., 36 All, 315.

(4) (1908) I. L. R., 35 Calc., 457.

(5) (1912) I L. R., 39 Calc., 781.

(6) (1908) I. L. R., 32 Mad., 218.

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as well as in the two Calcutta cases, the principle was most clearly affirmed that section 350 of the Criminal Procedure Code applied as much to cases in which a Magistrate ceases to exercise jurisdiction so far as the particular case in question is concerned, by reason of its transfer to another court, as to cases in which the Magistrate ceases to exercise jurisdiction by reason of his own death or transfer to another post. It has been shown to us that the two Calcutta cases are not entirely consistent with certain prior decisions of that Court, but they do represent the latest views of that Court on the question for determination before us. On the wording of the section itself it seems impossible to deny that the words used are wide enough to cover cases of transfer, as well as those cases in which the court remains the same, but the person of the presiding officer is changed. As the learned Judges of the Madras High Court have pointed out, the words "ceases to exercise jurisdiction *therein*" must be given their appropriate meaning; and certainly a Magistrate who takes cognizance of a case on the passing of an order of transfer by a competent court has jurisdiction "*therein*," that is to say, in the said case, by reason of the order of transfer.

On the ground of public convenience there seems to be no good reason why the words of the section should not receive a liberal interpretation, provided such interpretation is not inconsistent with the words themselves.

It seems to us that there is no good reason why the practice of this Court should not be brought into conformity with that of the High Courts of Calcutta and Madras, and we are prepared to hold that the provisions of section 350, Criminal Procedure Code, do apply under the circumstances to the case now before us.

It has been further suggested that we ought to interfere on the ground that Ram Das was prejudiced in his defence by the form of the order of transfer passed by the District Magistrate. The learned District Magistrate would have been better advised if he had contented himself with calling attention to the fact that his order was made largely on an undertaking by Ram Das that he would not claim his right to have all the witnesses re-summoned and re-heard. He went a little further than this, and by his order of transfer purported to direct the first class Magistrate to whose

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court he transferred the case to proceed with the trial from the stage which it had reached in the court of the Honorary Magistrate. If the applicant Ram Das had come before the first class Magistrate and had repudiated the undertaking which he had given to the District Magistrate, had offered some explanation of his conduct in doing so, and had definitely claimed the right conferred by proviso (a) of clause (1) of section 350 of the Criminal Procedure Code, it may well be that other considerations would arise. Certainly, the Magistrate who decided this case could not be bound in his judicial capacity by any direction in the order of transfer. It would have been his duty to consider the application and give such effect to it as he thought just and lawful. The fact remains, however, that Ram Das did not demand that any of the witnesses should be re-summoned and re-heard. Proviso (a) to clause (1) of section 350 of the Criminal Procedure Code has no application to the facts before us and cannot be relied on in support of the application.

Something has been said as regards the severity of the sentence. This point was not taken in the application to the Sessions Judge and we are not prepared to interfere on this ground, as the judgment convicting Ram Das seems to be a just and a proper one. We decline to accept the reference and order the record to be returned, the conviction and sentence to stand. If Ram Das has been released pending this reference he must surrender to his bail and undergo the unexpired portion of his sentence.

WALSH, J.—I entirely agree. Apart from authority, I think the section is clear and too strong for the argument of the applicant in this case. Criticism has been made upon the construction of the section, but it seems to me a simple and compendious statement to cover all cases thus—"Whenever any Magistrate ceases to exercise jurisdiction in a case and he is succeeded by another Magistrate having such jurisdiction," (that may occur by death, promotion, retirement or transfer by a superior authority) "the Magistrate so succeeding may act on the materials already before him."

Lest it should be supposed that the accused is caught by a strict application of the technical provisions of the Statute, I want to draw attention to one or two matters, to which my brother

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has not referred. The appellant asks for reduction of sentence, on the ground that it was too severe. He called a number of witnesses to allege that he was not there at all and on the other hand, he brought a cross charge against a prosecution witness for assaulting him at the place in question. Under these circumstances, having a reasonable apprehension that he was going to be convicted, he applied for transfer. In my judgement the accused, Ram Das, got a very favourable order out of the District Magistrate, and he is the one person who has no right to complain. I should want to hear considerable argument before deciding that under such circumstances in acting upon the evidence already recorded the Magistrate committed any irregularity which could not be cured by section 537 in the absence of circumstances showing a failure of justice. I entirely agree with my learned brother in the order that this reference must be rejected.

Reference rejected.

APPELLATE CIVIL.

1918.
 January, 16.

Before Mr. Justice Piggott and Mr. Justice Walsh.

KAILLU (PLAINTIFF) v. SITAL (DEFENDANT)*

Act (Local) No. II of 1901 (Agra Tenancy Act), section 20—Occupancy tenancy acquired by a member of joint Hindu family—Profits thrown into common stock—Member of joint family other than the tenant allowed to cultivate.

A special Statute like the Agra Tenancy Act can and does modify the operation of the ordinary Hindu law in certain matters.

Where a zamindar admitted as an occupancy tenant a person who was a member of a joint Hindu family it was *held* that such tenant did not, by throwing the profits derived from this land into the common stock of the joint family, cause the tenancy to become part of the joint family property nor did he, by allowing another member of the joint family to cultivate specific plots forming parts of the holding, effect anything more than the creation of a sub-tenancy in favour of such member.

THIS was a suit for a declaration of right to joint possession of certain occupancy holdings.

The facts of the case are shortly as follows:—The plaintiff's father, Ganga, and the defendant's father, Matola, were first cousins. The holding in suit was acquired by Matola in his own

*Second Appeal No. 417 of 1916, from a decree of Austin Kendall, District Judge of Cawnpore, dated the 10th of December, 1915, reversing a decree of Muhammad Junaid, Munsif of Fatehpur, dated the 21st of August, 1915.

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name under a lease from the zamindar in 1864. Ever since, the name of Matola, and on his death the name of the defendant, had been recorded in the revenue papers as the occupancy tenant of the holding. The plaintiff's name was recorded as a sub-tenant in respect of half of the holding on a rent which was precisely half of that payable to the zamindar. The defendant sued the plaintiff in the Revenue Court for ejectment as a sub-tenant. On the plaintiff's pleading that he was not a sub-tenant, but was an occupancy tenant in his own right, the Revenue Court referred the plaintiff to the Civil Court under section 199 of the Tenancy Act. The plaintiff thereupon brought the present suit for a declaration that he was joint with the defendant in cultivation of one-half of the land in dispute. His case was that the occupancy holding was the joint ancestral property of the parties. Formerly the family was in joint possession, but some years back there had been a partition of it and the holding had been equally divided between the parties, and they were in possession of their half shares separately. The defendant denied the plaintiff's allegation as to jointness, and urged that the occupancy holding was a self-acquisition of his father, Matola, and had on the latter's death descended to his sons, and the plaintiff was in possession of half of the holding as a sub-tenant. The court of first instance found the facts in favour of the plaintiff and decreed the suit. On appeal the District Judge (Mr. Kendall) held that, as the occupancy holding had been acquired in the name of Matola alone, it was immaterial to consider whether Matola was a member of a joint Hindu family along with the plaintiff and his father. He further held that by allowing the plaintiff to cultivate half of the holding on payment of half of the head-rent the defendant had never intended to give up his occupancy rights nor had the plaintiff been recognized as an occupancy tenant by the zamindar. The suit was accordingly dismissed.

The plaintiff appealed to the High Court. The appeal came on for hearing before WALSH, J., who remitted the following issues to the lower appellate court.

1. Whether Matola, at the time when he acquired the occupancy tenancy in question, was or was not a member of a joint Hindu family?

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2. If the answer to No. 1 is in the affirmative, whether the occupancy tenancy in question, so acquired by him, was self-acquired and if so, how?

3. Whether in any partition the tenancy in question was allotted wholly to the defendant as part of his share?

4. Whether the plaintiff is holding the half portion in question as a sub-tenant of the defendant, and if so, under what contract, express or implied, or under what circumstances did he become the sub-tenant or whether the plaintiff is holding as tenant-in-chief in his own right?

The findings returned on these issues by the District Judge (Mr. Ashworth) were as follows.

1. Yes.

2. Yes, as the letting was to him as an individual and not as representing the family.

3. No.

4. The plaintiff must be deemed to be holding as a sub-tenant of the defendant by reason of the following facts, namely, that the tenancy arose by reason of a transfer by the zamindar in favour of Matola alone and that the plaintiff's right of occupation is derived from Matola's son and not from the zamindar.

In his reasons for the findings on issues 1 and 3 the learned District Judge observed that "the holding was originally considered a joint one and has subsequently been partitioned" and he went on to say that "it appears to me that Matola—although he took the tenancy (so far as zamindar was concerned) as an individual—regarded the property held by him as a part of the property of the joint family. It was for this reason that it was partitioned and half of it was given to the plaintiff: certainly, if there was ever any partition, the land in question was allotted to the plaintiff and not to the defendant." On issue 2, the learned Judge said that "the sole question is, Was the contract of transfer between the zamindar and Matola a contract by the zamindar in favour of Matola as an individual on his own behalf or with Matola as member and representative of the joint Hindu family? There is no evidence on this point except the fact that Matola has always been entered in the papers as a tenant in his own right and not as the representative of the joint Hindu family.

Matola also alone is entered as tenant in the patta (i. e., acknowledgement of rent and area) given by the zamindar in 1864. Any way, in the absence of evidence to show that he took the property in a representative capacity, the plaintiff, on whom the burden falls of proving the fact, must fail. It may also be mentioned that a zamindar would be very unlikely to deal with a person acting on behalf of an unstable and fluctuating a body like a joint Hindu family."

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The plaintiff preferred objections to the findings.

On the hearing after remand WALSH, J., referred the case to a Bench of two Judges.

Babu *Piari Lal Banerji*, for the appellant, submitted that on the findings that Matola was a member of a joint Hindu family, and the profits arising from the holding had been thrown into the joint stock, the holding was the property of the joint Hindu family and the plaintiff should be held to be in possession in his own right and not as a sub-tenant of the defendant. The mere fact that the name of Matola alone appeared on the revenue papers did not show that the holding belonged to him exclusively. Having regard to the state of the family and the dealing with the holding it was clear that it never belonged to Matola alone, and in any case he himself had treated the holding as a part of the joint family property. The burden of proving self-acquisition lay upon the defendant, and in the absence of any evidence on the point, the plaintiff ought to succeed. The findings of the lower appellate court were inconsistent, and so far as they were against the appellant, they were arrived at by the Judge misdirecting himself and cannot be binding in this case.

An occupancy holding is property, and like any other property (e. g., a mortgage) can be acquired by an individual member on behalf of the joint family. There is nothing in the tenancy law to modify the well established rules of Hindu Law relating to joint families. He cited and discussed the case of *Mahabir Singh v. Bhagwati* (1).

Pandit *Kailas Nath Katju*, for the respondent, submitted that there was evidence on the record to support the finding that the holding had been acquired by Matola for his own benefit. The

(1) (1916) I. L. R., 38 All., 825.

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patta stood in his name, and his name, and after his death his son's name, had been continuously recorded in the revenue papers. They had been throughout paying rent direct to the zamindar, and the plainiff's name had never appeared as a co-sharer in the tenancy. If the holding was a self acquisition of Matola, he was under the law incompetent to transfer it to anybody, whether members of his joint family or not. Such transfer was prohibited by law. The throwing by an individual member of his self-acquisition into the joint stock was but a mode of transfer and would be as illegal as any other. The plaintiff was never recognized as a tenant-in-chief by the zamindar, who had always regarded the defendant as the sole tenant. The plaintiff, having acquired his interest in the holding through the defendant, must, having regard to the definition of the word "sub-tenant" in the Tenancy Act, be deemed to be a sub-tenant. A person did not cease to be a sub-tenant, though he paid a rent which did not exceed or even was less than the head-rent. The lower appellate court had found that the plaintiff was in possession of half of the holding under a private arrangement made at the time of partition of the joint family property between the parties whereby the plaintiff had been allowed to have half of the holding on payment of half of the rent to the zamindar. There was no privity of contract between the zamindar and the plaintiff, and the plaintiff having acquired the holding from the defendant was, in law, his sub-tenant. He referred to sections 20, 21 and 22 of the Agra Tenancy Act, 1901.

Babu *Piari Lal Banerji*, in reply, referred to *Babu Hiradas v. Pandit Sheo Dat Tewari* (1) and *Parmanand Singh v. Mahant Ramnand Gir* (2).

PIGGOTT, J.—In this case the plaintiff Kallu and the defendant Sital are related in this way that their paternal grandfathers were own brothers. Sital is the recorded tenant of a certain occupancy holding, Kallu is actually cultivating certain plots of land, making up one-half of the area of the holding, and is paying for the use and occupation of these plots approximately one-half of the rent recorded as payable by Sital to the zamindar. Sital took proceedings in a Revenue Court to eject Kallu on the allegation

(1) Select Decisions of the Board of Revenue, No. 19 of 1912.
(2) (1913) I.L.R., 35 All., 474.

that the latter was holding as his sub-tenant. Kallu replied that he was a joint tenant with Sital of the entire holding, that they had apportioned the fields between them merely for convenience of enjoyment, and that the half share of the rent payable by him was paid to the zamindar and not to Sital. On this the Revenue Court directed Kallu to establish his title as co-tenant of the holding by a suit in the Civil Court. This order purports to have been passed under section 199 of the Tenancy Act, (No. II of 1901). The propriety of the order is not in question before us, and I merely mention this in order that I may not be regarded as committed to the view that this section was really applicable to the facts above set forth. Kallu's suit for a declaration of his title as joint tenant of the holding to the extent of an undivided half share was decreed by the court of first instance and dismissed by the District Judge in first appeal. On a second appeal filed in this Court by Kallu certain issues of fact were remitted for trial to the lower appellate court and findings have been received. The third issue as drafted would seem only to arise in the event of the findings on the first and second issues being other than what they were, and therefore need not be considered. On the first two issues remitted the findings are that this occupancy holding was acquired by Matola, father of Sital; that Matola was at that time a member of a joint undivided Hindu family along with the descendant or descendants of his paternal uncle Dariyao. The letting was to Matola alone and not to Matola as representing the joint family. On the fourth issue a finding was returned that the tenancy enjoyed by Kallu was the result of a contract between himself and Sital, to which the zamindar was no party, and that it amounted in law to a sub-letting by Sital in favour of Kallu of the particular plots occupied by the latter. In a petition of objections presented to this Court under order XLI, rule 26, the plaintiff appellant has challenged the finding on the second issue, but, curiously enough, has not challenged the finding upon the fourth issue. In argument before us it has been contended that the reasoning upon which the learned District Judge has arrived at his finding on the second issue remitted to him is defective, that it proceeds upon an error of law and that it has been arrived at by mislaying the burden of proof. With regard

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to the abstract question of law sought to be raised on this appeal, I can only say that I could wish it had arisen in a case in which its consideration was not complicated by other circumstances. However, the position, as I understand it, taken up by the learned District Judge, seems to me substantially correct. It was proved that the letting of the land in question by the zamindar to Matola had taken place many years ago. There was a lease granted as long ago as the year 1864, which is one of the exhibits in the case. Matola, according to the District Judge, was at that time living as a member of a joint Hindu family along with his uncle Dariyao or his first cousin Ganga, or both. He took this land on lease from the zamindar and he threw the profits derived from the land into the common stock of the joint family of which he was a member. The District Judge says that no such action on the part of Matola could have the effect in law of changing the tenancy from a tenancy in favour of Matola to a tenancy in favour of the entire joint family of which Matola was a member. The interest of a non-occupancy tenant or of an occupancy tenant is not transferable except under the restrictions laid down by section 20 of the Tenancy Act (No. II of 901). If it were held that the conduct ascribed by the District Judge to Matola in the present case amounted to throwing his rights as occupancy tenant into the common stock of the joint family, and thereby under the Hindu law making those rights parts of the joint assets of that family, it seems to me that the court would in effect be sanctioning a transfer of the holding by Matola to a body of persons, namely, the members of the joint family to which Matola at that time belonged. A special Statute like the Local Tenancy Act can and does modify the operation of the ordinary Hindu law in certain matters. The scheme of inheritance laid down by section 22 of that Act is other than that prescribed by the ordinary rules of Hindu law, and no one denies that, within the scope of its operation, section 22 aforesaid overrides and prevails against the ordinary Hindu law of inheritance. It seems to me that by a parity of reasoning it follows that, when the zamindar concerned accepted Matola as his tenant, he could not be compelled by reason of any action taken by Matola to accept the entire joint family as his tenant. Our attention has been drawn in argument

to one or two reported decisions of this Court. One of these clearly recognizes the fact that a Hindu joint family as such may in its corporate capacity be the tenant of a holding. This proposition I have no desire to dispute. A tenancy of this sort might easily come into existence in favour of the sons of the tenant who originally acquired occupancy rights. And I see nothing in the Tenancy Act to conflict with the view that, if those sons lived together as members of a joint Hindu family, the family as such could be regarded as in possession of the tenancy. In the present case, apart from the abstract question of law involved, we have to meet this difficulty. The findings returned by the learned District Judge are clear and explicit, and the objections taken to them are objections against the train of reasoning by which the District Judge has arrived at those findings. That is what I mean by saying that the question of law involved arises in this case in a complicated form. For the purpose of deciding this case it seems to me sufficient to say that the finding of the learned District Judge on the second of the two issues remitted to him is not inconsistent with his finding on any of the other issues, and is not shown to be vitiated by any error of law. There remains also the finding of the District Judge on the fourth issue. I understand the finding to be in substance this. The joint family has now admittedly been broken up, and apparently this separation took place between Kallu and Sital. At that time Sital recognized that Kallu had a claim upon him in respect of the profits enjoyed by him from this holding, by reason of the fact that Matola had always thrown those profits into the common stock of the joint family. He therefore entered into an arrangement by which he gave Kallu the right to certain specific plots, making up one-half of the area of the holding, and undertook not to demand from Kallu more rent than he would himself have to pay to the zamindar on account of this one-half of the entire holding. The rent to the zamindar continued to be paid by Sital and receipts were made out in his name. In the absence of any plea in the appellant's petition before us, presented under order XLI, rule 26, against the finding on the fourth issue, I am not sure that the appellant is entitled to ask us to hold that that finding

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proceeds upon an error of law. Assuming that point, however, in his favour, it seems to me that the reasoning of the District Judge is correct. For the sake of argument, take the case of an ordinary creditor of an occupancy tenant. That creditor is pressing for payment and is willing to take in satisfaction of his claim such profits as he may be able to make out of one half of the occupancy holding. The tenant is forbidden by law to transfer his interests as such tenant, but he can sub let, or he can make an assignment of the profits from year to year. Suppose that he gives his creditor the right to occupy and cultivate for his own benefit certain specific plots, forming part of his holding, and agrees only to take in the way of rent the same sum which he will himself have to pay to the landlord on account of those plots. The transaction amounts virtually to a sub-letting in favour of the creditor. The creditor thereby acquires no rights as against the zamindar, and his rights as against the occupancy tenant are limited by the terms of the contract between them. I think therefore that the finding of the District Judge on the fourth issue remitted to him is correct in law and is decisive of the appeal now before us. I would therefore dismiss the appeal with costs.

WALSH, J.—I agree

By THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

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Before Sir Henry Rycha d., Knight, Chief Justice and Mr. Justice Tudball
MUHAMMAD NIAZ KHAN, AND OTHERS (PLAINTIFFS) v MUHAMMAD
IDRIS KHAN AND ANOTHER (DEFENDANTS),*

Muhammadian law—Pre-emption—Sale disguised as a lease in order to defeat pre-emption—Device not permissible under the Muhammadian law.

In a suit for pre-emption, whether the right is claimed under the Muhammadian law or by virtue of a custom of pre-emption, it is the duty of the Court, if the question is raised, to consider and decide whether the transaction in respect of which the claim is brought is or is not in substance a sale, though it may be disguised in some other form, as for instance, in that of a lease.

There is no rule of Muhammadian law which renders it permissible for a transaction of sale to be framed as a lease so as to avoid claims for pre-emption.

THIS was a suit for pre-emption under the Muhammadian law. A plot of land in the town of Zamania in the district of Ghazipur

* Second Appeal No 1280 of 1915, from a decree of Ram Prasad, District Judge of Ghazipur, dated the 4th of May, 1915, reversing a decree of Muhammad Munir Khan, Munsif of Ghazipur, dated the 17th of December, 1914.

was transferred by a deed, dated the 21st of July, 1913, purporting to be a perpetual lease, under the terms of which Rs 250 was paid as a premium and annuities two was reserved as rent per year. The plaintiffs sued for pre-emption, alleging that the transaction was in fact a sale. The court of first instance decided in favour of the plaintiffs' contentions. The lower appellate court was of opinion that, even if it were taken for granted that the real object was to sell the land and that the lease was executed to avoid a pre-emption suit, the point for determination was whether or not the execution of a lease could be held to be a legal device (*heelah sharai*) under the Muhammadan law to defeat the right of pre-emption. The court held that under the Muhammadan law such a device could defeat the right of pre-emption, and dismissed the suit without deciding any other point.

The plaintiffs appealed.

Mr *Ishaq Khan*, for the appellants :—

The court below is wrong in holding that such a device is allowed under the Muhammadan law for the purpose of defeating a right of pre-emption. In the following cases pre-emption was allowed, notwithstanding the adoption of such or similar devices; for example, where no sale deed was executed, or where the deed was ostensibly a mortgage or a perpetual lease reserving a nominal rent — *Janki v. Girjadat* (1), *Begam v. Muhammad Yaqub* (2), *Taru Chand v. Baldeo* (3), *Parma Nand v. Arapat Ram*, (4), *Muhammad Umar v. Kirpal* (5), *Anwar Hasan v. Umatul Karim* (6), *Amar Singh v. Sadhu Singh* (7) and *Lalyi Misr v. Jaggu Tiwari* (8).

Dr. *S. M. Sulaiman*, (with him *Maulvi Iqbal Akmad*), for the respondents :—

The lower appellate court has in effect found that the transaction was not a sale but really a perpetual lease. Upon that finding the claim for pre-emption must fail. It has been held that under the Muhammadan law no right of pre-emption arises in respect of perpetual leases, however small the rent reserved may be; *Moorooly Ram v. Daboo Huree Ram* (9), *Babu*

(1) (1885) I L R, 7 All, 432.

(2) (1894) I L R, 16 All 344.

(3) (1890) Punj Rec., p 371.

(4) (1899) Punj Rec, p 118.

(5) (1904) Punj Rec, p 263.

(6) (1906) Punj Rec., p 518.

(7) (1914) 23 Indian Cases, 970.

(8) (1910) I L R, 33 All, 104.

(9) (1887) 8 W.R., 106.

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Ram Golam Singh v. Nursing Sahoy (1) and *Dewanutulla v. Kazem Molla* (2).

RICHARDS, C. J., and TUDBALL, J.:—This appeal arises out of a suit brought for pre-emption under the Muhammadan law. The property transferred is a small piece of land in the town of Zamania. The transfer was made in the form of a perpetual lease. The amount paid down was the sum of Rs. 250 and a nominal rent of two annas per annum was reserved. The court of first instance decreed the suit, holding that there was a sale, and that the plaintiff had a right. The lower appellate court held that pre-emption under the Muhammadan law did not apply to the case of leases. Accordingly, without deciding the other issues, the lower appellate court reversed the decree of the court of first instance and dismissed the suit. We think, reading the judgement of the lower appellate court, that the learned District Judge never intended to overrule the finding of the court of first instance that the transaction, though carried out in the form of a lease, was in reality a sale. We think that he intended to decide that a Muhammadan could make a transfer *in the form of a lease*, notwithstanding that the real intention of the parties was a sale, and so defeat pre-emption, in other words, that such devices are not unknown in the Muhammadan law and are legitimate. In our opinion the court was entitled and bound on the issue being raised to consider at the instance of the plaintiff claiming pre-emption, what was the real nature of the transaction. It was entitled to consider the sum which was paid down, the smallness of the rent, and the value of the property; and if, after considering all these matters, it came to the conclusion that the transaction was in truth and fact a sale, it should hold that the right of pre-emption arose, and proceed to consider whether the plaintiff by due observance of the requirements of the Muhammadan law was entitled to get the property. If the court came to the conclusion that in the truth and substance and not merely in form the transaction was a lease then the suit should be dismissed on the ground that the Muhammadan law does not apply to transfers by way of leases. It has been more than once decided in this Court that where a custom of pre-emption prevails upon sale the

(1) (1875) 25 W. R., 43.

(2) (1887) I. L. R., 15 Cal., 184.

véndor and vendee cannot defeat the pre-emptor by dressing up the transaction in the garb of a lease. The same thing has been held in the Punjab, where apparently the right of pre-emption is regulated by Act. We can see no good reason why the same principle should not apply to cases where the right is one under the Muhammadan law. It is clear that the case must go back to the lower appellate court. We accordingly allow the appeal; set aside the decree of the lower appellate court, and remand the case to that court with directions to re-admit the appeal upon its original number in the file and proceed to hear and determine the same according to law, regard being had to what we have stated. Costs here and heretofore will be costs in the cause.

Appeal decreed and cause remanded.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

GOKUL (PLAINTIFF) v. MOHRI BIBI (DEFENDANT)*

Civil Procedure Code (1908), order XXI, rule 58—Execution of decree—Act No IX of 1908 (Indian Limitation Act), schedule I, article 11—Limitation—Objection to attachment dismissed—Subsequent suit for possession—Investigation of objection by Court.

Article 11 (1) of the first schedule to the Indian Limitation Act, 1908, applies only to those orders made under order XXI, rule 51, which are made after investigation of the claim or objection; but it does not follow that, merely because the claimant has not adduced evidence or has not appeared, there has been no investigation within the meaning of the rule. *Rahim Bux v Abdul Kader* (1), *Shagun Chand v. Shibli* (2), *Chandi Prasad v. Nand Kishore* (3), *Lachmi Nairain v. Maundell* (4), and *Kunj Behari Lal v. Kandh Prasad Nairain Singh* (5) referred to.

THE facts of the case are fully set forth in the judgement. Briefly stated, for the purpose of this report, they were as follows:—In execution of a simple money decree in favour of Basant Lal against Jageshar, a certain fixed-rate holding was attached as being the property of Jageshar. Thereupon an objection under section 278 of the Code of Civil Procedure of 1882 was

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* Second Appeal No 51 of 1916, from a decree of E. Bennet, Subordinate Judge of Mirzapur, dated the 5th of August, 1915, confirming a decree of Shibendra Nath Banerji, Munsif of Mirzapur, dated the 29th of March, 1915.

(1) (1904) I. L. R., 32 Cal., 537.

(3) (1913) 20 Indian Cases, 369.

(2) (1911) 8 A. L. J., 626.

(4) (1897) I. L. R., 19 All., 253.

(5) (190) 6 C. L. J., 362.

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filed by Gokul, minor, through his next friend, his mother, claiming that a portion of the holding belonged to him and not to Jageshwar and was, therefore, not liable to be attached and sold in execution of the decree. On the 15th of June, 1901, the date fixed for hearing of the objection, an application was made by the objector's pleader praying for an adjournment on the ground that information of the date of hearing had reached the minor's guardian too late to take steps for summoning witnesses. This application was rejected, and the objection was dismissed by the following order:—"This is an objection under section 278, Civil Procedure Code. The correctness of it is disputed by the decree holder. The objector has produced no evidence to make out the truth of his claim, and it is disallowed with costs." The attached property was thereafter put up to auction sale and purchased by the decree-holder, who obtained actual possession on the 23rd of February, 1904. On the 20th of June, 1914, Gokul instituted a suit against Basant Lal's widow for possession of his share of the holding. He stated that he had attained majority in June, 1912. The defendant pleaded, *inter alia*, that the suit having been brought more than a year after the dismissal of the objection under section 278 was barred by limitation under article 11 of the Limitation Act. This plea was upheld and the suit dismissed by both the lower courts. The plaintiff filed a second appeal in the High Court.

Mr. S. A. Haidar for the appellant:—

The cause of action for the suit is the dispossession of the plaintiff on the 23rd of February, 1904, and the suit being brought within 12 years thereof, is not barred by limitation. The lower courts have misapplied article 11 of the Limitation Act. The order of the 15th of June, 1901, dismissing the objection under section 278 of the former Code was not of such a character as to be conclusive on failure of the objector to bring a suit within one year. It has been laid down that unless the investigation which is clearly contemplated by section 278 has been made and the matter has been judicially determined by the court, the order passed by it cannot be regarded as one made under section 281. The only order upon which the character of finality is impressed by section 283 is an order properly made under section 281, i. e. after investigation and inquiry; *Kallar*

Singh v. Toril Mahlon (1), *Kunj Behari Lal v. Kandh Prasad Narain Singh* (2), *Sarala Subba Rau v. Kamsala Timmayya* (3), *Sujan Ram v. Ram Ratan* (4). In these cases the order disallowing the claim was passed in default of appearance, and it was held that, as there had been no investigation whatever on the merits, the order was not conclusive, and article 11 of the Limitation Act was not applicable to the suit subsequently instituted by the claimant. In the present case, too, there was no inquiry into the merits. Although on the date fixed the pleader for the objector put in an application for adjournment on the ground that witnesses could not be summoned, still that fact alone would not make the dismissal other than a dismissal for default of appearance. *Lalla Prasad v. Nand Kishore* (5).

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There are some cases of the Allahabad High Court which may be cited against me, but they are distinguishable. The case of *Lachmi Narain v. Martinelli* (6) was decided under the former Rent Act XII of 1881 and not under the Code of Civil Procedure. Having regard to the fact that the scheme and object of that Act are different from those of the Code of Civil Procedure, that case has no bearing here. In the case of *Shagun Chand v. Shibbi* (7) the claimant's pleader stated, on the date fixed, that his client did not wish to adduce any evidence. That was practically an admission that he could not substantiate his claim, and the order of dismissal under those circumstances was virtually a judgement that the claim was without merits; in a sense there was the best investigation possible under the circumstances. The matter is very different in the present case, in which the claimant was anxious to adduce evidence, and what he prayed for was an opportunity to produce that evidence. The refusal of the prayer for adjournment shut out the claimant from substantiating his claim on the merits so that there was no investigation of those merits. A similar case was that of *Chandi Prasad v. Nand Kishore* (8), in which the claimant had summoned his witnesses but deliberately abstained from producing them. In the case of *Rahim Bux v. Abdul Kader* (9) a list of witnesses desired to be

(1) (1895) 1 O. W. N., 24.

(2) (1901) 6 O. L. J., 362.

(3) (1907) I. L. R., 31 Mad., 5.

(4) (1904) Punj. Rec., p. 318.

(5) (1899) I. L. R., 22 All., 66.

(6) (1897) I. L. R., 19 All., 253.

(7) (1911) 8 A. L. J., 626.

(8) (1913) 20 Indian Cases, 369.

(9) (1904) I. L. R., 32 Calc., 537.

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summoned had been put in, but the necessary process fees were not paid. By his own conduct the claimant had put it beyond his power to prove his case. The circumstances of the present case are quite different. The correctness of the decision in the last mentioned case was doubted in *Sarat Chandra Basu v. Tarini Prasad Pal Chowdhry* (1), which is entirely in my favour.

[The argument then proceeded to deal with another point] Dr. *Surendra Nath Sen*, for the respondent, was not called upon.

MUHAMMAD RAFIQ and PIGGOTT, JJ :—The facts which have given rise to this appeal are as follows :—

There were three brothers, Kauleshar, Chandu and Jageshar, who owned a fixed-rate holding of seven bighas and five biswas. According to the plaint the three brothers separated and the holding was privately divided amongst them. On the 9th of January, 1900, the name of Jageshar was entered in respect of two bighas and five biswas, and the rest, five bighas, stood in the name two of brothers, Kauleshar and Chandu. Kauleshar died leaving him surviving his son, Gokul. Chandu died leaving him surviving a widow only and no issue. One Basant Lal obtained a simple money decree against Jageshar, one of the brothers mentioned above, and against Govind, a third party. In execution of his decree Basant Lal attached the whole of the holding, namely, the fixed-rate holding of seven bighas and five biswas. At the time of the attachment the two widows of Kauleshar and Chandu were alive, as also the son of Kauleshar called Gokul, who was a minor at the time. On the 27th of March, 1901, Gokul filed an objection through his mother as guardian, objecting to the attachment, presumably on the ground that his father and uncle, Chandu, were separate from Jageshar and their property was not liable to sale and attachment in the decree of Basant. On the 5th of June, 1901, the date fixed for hearing the objections, an application was presented to the court on behalf of the guardian of the minor praying for an adjournment, on the ground, that the information of the date of hearing had reached the guardian too late to take steps for production of evidence. The learned Subordinate Judge rejected the application for adjournment and proceeded to dispose of the objections. The order, made on the objections, is as follows :—“ This is an

(1) (1907) I. L. R., 34, Cal., 421.

objection under section 278 of the Civil Procedure Code. The correctness of it is disputed by the defendants. The objector has produced no evidence to make out the truth of his claim and it is dismissed with costs." After the rejection of the objection the entire holding of seven bighas and five biswas was put up to auction and purchased by Basant Lal, the decree-holder. On the 21st of June, 1902, the amin, who was deputed to deliver possession to the purchaser, reported that the widows of Kauleshar and Chandu had obstructed him in his duties. The purchaser having taken no steps, his application for delivery of possession was rejected on the 5th of July, 1902. On the 19th of July, 1903, he again applied for delivery of possession and succeeded in getting it on the 23rd of February, 1904. On the 20th of June, 1914, Gokul, the plaintiff appellant, instituted the suit out of which this appeal has arisen, for possession of five bighas of the fixed-rate holding on the allegation that said the land was not liable to attachment and sale in execution of the decree of Basant Lal against Jageshar. Gokul further stated in his plaint that his father Kauleshar and his two uncles, Jageshar and Chandu, had separated long prior to the decree of Basant and had divided the holding equally amongst themselves. After the separation each brother was in possession of his own share. Basant Lal, the decree-holder, could only sell the share of Jageshar. At the time of the execution of the decree of Basant Lal he, the plaintiff, was a minor and was entitled to object as regards the share of the holding that belonged to his father only. Chandu's widow, Musammat Katwari, was alive at the time of the attachment and the sale of the holding. She died some years after. On her death the share of Chandu came to the plaintiff as the reversionary heir. He attained majority in June, 1912, hence the suit was brought for recovery of the possession of that portion of the holding which belonged to his father and his uncle, Chandu. The claim was resisted on various pleas. It was urged on behalf of the defendant that the three brothers were joint and had never separated and that the decree against Jageshar had been passed in the capacity of the *karta* of the family. It was therefore binding on all the three brothers and their legal representatives. The plea of limitation was urged in respect of the entire claim on the basis of the

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plaintiff's objections, dated the 27th of May, 1901. The learned Munsif in whose court the suit was filed held that the three brothers were joint and therefore the decree of Basant Lal was binding on the plaintiff. He further found that the objections, dated the 27th of May, 1901, made by the plaintiff through his mother related to the whole of five bighas, the alleged share of Chandu and Kauleshar, and the objections having been dismissed and the suit having been brought more than one year after the dismissal, the present claim was barred under article 11 of schedule I to the Limitation Act. The plaintiff preferred an appeal to the District Judge who disagreed with the first court as to the status of the family of the three brothers but agreed with it as to the plea of limitation. The learned District Judge held that the three brothers were separate but that the claim was obviously barred under article 11 of schedule I to the Limitation Act.

The plaintiff in his second appeal to this Court advances two contentions. He says that his claim is not barred under article 11 of schedule I of the Limitation Act, inasmuch as his objection was dismissed without any investigation, and, secondly, in any case his claim with regard to two bighas, ten biswas, of the holding which he inherited from his uncle, Chandu, after the death of the latter's widow, cannot be said to be barred by limitation as the lady died after the dismissal of the objections, and she had taken no objection to the attachment and sale of the holding. The second contention may be dismissed in a few words. There is a distinct finding of the learned Munsif that the objections of the plaintiff related to five bighas of the holding, that is, the share of his, i.e., plaintiff's, father and uncle. The plaintiff took no objection to this finding in his appeal to the District Judge. There is nothing on the record to make us come to a different conclusion and hold that the objection related only to the share of Kauleshar. In the plaint itself the plaintiff does not mention the fact of having made an objection in 1901 and there does not seem to be any replication or any statement by him in reply to the written statement that his claim was barred because it was brought a year after the order of the 5th of June, 1901. In support of the first contention a number of cases have been cited by the learned counsel for the plaintiff appellant. The following

cases have been relied upon by the plaintiff, namely, *Kallar Singh v. Toril Mahton* (1), *Kunj Behari Lal v. Kandh Prasad Narain Singh* (2), *Sarat Chandra Basu v. Tarini Prasad Pal Chowdhry* (3), *Sarala Subba Rao v. Kamsala Timmayya* (4) and *Sujan Ram v. Rattan* (5). According to these cases, an objection made under section 278 of the old Code of Civil Procedure, corresponding to order XXI, rule 58, of the present Code, if dismissed without investigation, would take the case of the objector out of the operation of one year's rule of limitation. But the question is what does the word "investigation" mean? There are cases which go to show that the circumstances under which the objections of the plaintiff were disposed of were not such as to warrant the conclusion that they were decided without investigation, *vide—Rahim Bux v. Abdul Kader* (6), *Shagun Chand v. Shibbi* (7) and *Chandi Prasad v. Nand Kishore* (8). We would also refer to *Lachmi Narain v. Martindell* (9), for the principle according to which the limitation of one year should be enforced. Most of the case-law has been discussed by Mr. Justice MUKERJI in the case of *Kunj Behari Lal v. Kandh Prasad Narain Singh* (2). After the consideration of the case-law the learned Judge concludes thus:—"It is manifest, therefore, from the language of the Code itself, that the only order upon which the character of finality is impressed is an order made upon inquiry." He also remarks:—"It does not follow, however, that merely because the claimant does not advance evidence or is absent, there are no materials before the court to enable it to inquire into the matter." In the present case the learned Subordinate Judge dismissed the objections of the plaintiff, not in default, nor without any investigation. It is true that the plaintiff produced no evidence in support of his objections, but it does not follow that there was no material on the record to enable the Judge to dispose of the objections. We think that the cases relied upon by the plaintiff appellant are distinguishable from the case before us.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

(1) (1896) 1 C. W. N., 24

(2) (1907) 6 C. L. J., 362.

(3) (1907) I. L. R., 34 Cal., 491.

(4) (1906) T. L. R., 31 Mad 48.

(5) (1904) Puri Rec., p. 328

(6) (1905) I. L. R., 32 Cal., 537.

(7) (1911) 8 A. L. J., 626.

(8) (1903) 20 Indian Cases, 369

(9) (1897) 19 A. L. J., 258.

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1918
January, 24.

Before Mr. Justice Piggott and Mr. Justice Walsh.

HAMID HUSAIN (PLAINTIFF) v. KUBKA BEGAM (DEFENDANT).*

Muhammadian law—Suit for restitution of conjugal rights—Defence to suit—
Cruelty

In a suit by a Muhammadan husband against his wife, for restitution of conjugal rights it was found on issues remitted by the High Court that there was no very satisfactory evidence of actual physical cruelty, but that the parties were on the worst possible terms and the reasonable presumption was that the suit was brought for the purpose of getting possession of the defendant's property. The wife had been a good deal of ill-treatment short of physical cruelty, and the court was of opinion that by a return to her husband's custody the defendant's health and safety would be endangered. In these circumstances the High Court refused to interfere with the decree of the Court below dismissing the suit. *Amour v. Amour* (1) referred to.

THIS was a suit brought by the husband for restitution of conjugal rights. The court of first instance (Subordinate Judge of Saharanpur) decreed the claim; but on the defendant's appeal the District Judge set aside the decree and dismissed the suit. The plaintiff appealed to the High Court.

The case coming on for hearing before PIGGOTT and WALSH, JJ. the following order was made—

"This was a suit for restitution of conjugal rights by a Muhammadan husband. It was decreed by the court of first instance; but has been dismissed by the learned District Judge of Saharanpur in appeal, on the ground that the plaintiff 'had treated his wife in such a way that he has lost all right to claim restitution of conjugal rights.'

"We are of opinion that the findings of fact recorded by the lower appellate court are not specific enough to dispose of the suit. The principles of law applicable to a defence of 'legal cruelty' raised in a case of this sort were laid down by their Lordships of the Privy Council in *Munshi Buzloor Raheem v. Shamsunissa Begam* (2). We may refer also to two decisions of this Court, viz., *Husaini Begam v. Muhammad Rustam Ali Khan* (3) and *Khurshedi Begum v. Khurshaid Ali* (4). We remit the

* Second appeal No. 616 of 1916, from a decree of F. S. Tabor, District Judge of Saharanpur, dated the 14th day of January, 1916, reversing a decree of Kallika Singh, Subordinate Judge of Saharanpur, dated the 21st of June 1915.

(1) (1904) 1 A. L. J., 318.

(3) (1907) I. L. R., 29 All., 222.

(2) (1868) 11 Moo. I. A., 551 (610, 611).

(4) (1914) 12 A. L. J., 1055.

following issues for determination by the court below, on the evidence already on the record:—

(i) Is it proved that the defendant has in the past been subjected to ill-treatment, physical or mental, by the plaintiff?

“The finding on this issue should be as specific as possible as regards time, circumstances and the nature of the ill-treatment found.

(ii) On the case as a whole, is the Court of opinion that the defendant has reasonable grounds for believing that her health and safety would be endangered if she returned to her husband's custody?

“Ten days will be allowed for objections after the return of findings.”

The findings returned by the lower appellate court, were as follows:—

“The issues remitted here are:

(1) Is it proved that the defendant has in the past been subjected to ill-treatment, physical or mental, by the plaintiff?

(2) On the case as a whole is the Court of opinion that the defendant has reasonable grounds for believing that her health and safety would be endangered if she returned to her husband's custody?

“The story which the defendant put forward in an application sent by her to the Collector of Muzaffarnagar and Saharanpur was that the plaintiff was really only her agent, but that by some cunning he had made himself out to be her husband; that he wanted her money and with the assistance of a vakil named Liaqat Husain tried to induce her to transfer her property to the plaintiff's name, and that when she refused to comply he took her to kasba Kairana, and kept her a prisoner for one and a half years in the vakil's house, after pretending that he was taking her to Meerut to have false teeth made; that in order to extort property from her he prevented her relations from coming to her; that she was beaten by Liaqat Husain, and treated in a manner in which prisoners in jail are probably not treated. The result, she said, was that she suffered from facial paralysis and palpitation of the heart. She went on to say, that plaintiff and Liaqat Husain compelled her by deception to transfer property in their favour, and had got her

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thumb-impression on some paper. That the plaintiff told her that the house at Kairana was that of a robber and knifer. That Jawad Husain (son of the other defendant Zahid Husain) her sister's daughter's son came and called out her name. She ran to see him, but Liaqat Husain scolded his servants for letting him in. That Jawad Husain told her that the house (in which she was imprisoned) was Liaqat Husain's and not that of a robber, that Liaqat Husain did not allow her to say anything more. That plaintiff then took her from Kairana to Sarsena and then from Sarsena to Kalear, where she was made to execute a sale-deed in favour of the wife of one Ashiq Husain and register it before the Sub-Registrar. That this document was for Rs. 20,000 or Rs. 21,000 of which Rs. 7,000 were paid before the Sub-Registrar, of this plaintiff deposited Rs. 6,000 with the banker Jagmandar Das and kept Rs. 500 himself, Rs. 500 had been taken by him previously as earnest money. That plaintiff then put her in the train with his servant to take her back to Kairana. He did not, however, tell her where she was to go, when the train arrived at Saharanpur, she saw Jawad Husain on the platform, jumped out, and embraced him, and asked him what station it was. On his telling her she went home with him.

"She said also that she had fever when she executed the sale deed and that in addition to the Rs. 7,000 abovementioned, plaintiff took from her her boxes containing ornaments to the value of Rs. 2,000. That plaintiff is a pauper, he uses violence to me and robs me of my money.

"Jawad Husain corroborates this story as far as his going to Kairana is concerned, and says that he received a letter from the defendant complaining of ill-treatment. He, however, met her at Saharanpur by chance. Sabir Husain, who went with him to Kairana, also corroborated.

"Examined in court, defendant added that when she was at Saharanpur with him (before she was taken to Kairana) plaintiff beat her very much, that sometimes she aches even now from the wounds. After marriage, he sometimes used to dine out, and was always quarrelling with her and abusing her and her parents, saying that she was of loose behaviour, and demanding money of her; sometimes Rs. 2,000 and sometimes Rs. 3,000.

—“ She adds that she has transferred her property to Jawad Husain her child, who is now owner of the property.

“ When defendant took up her residence in Zahid Husain’s house plaintiff made an application to the Magistrate under section 552 of the Code of Criminal Procedure asking that the police should order the release of his wife. Then he brought a complaint under section 498 of the Indian Penal Code against Zahid Husain saying that he had enticed her away, and was keeping her as his wife. The Joint Magistrate dismissed this on the 18th of March, 1915, and it was absurd enough complaint, defendant is about 50 years of age, and is said to have lost all her teeth. Plaintiff then filed the present suit.

“ The plaintiff’s evidence shows him to be probably without property, although he says that property entered in Liaquat Husain’s name belongs to him. He has had no residential house for ten years; Liaquat Husain is helping him in this suit by ‘ money and advice ’; he now lives in Liaquat Husain’s house. He admits having kept the defendant ‘ aloof ’ so that no relations might carry her off.

“ The plaintiff has called witnesses to prove that, though they live close to where he lives, they never heard any sound as if plaintiff was ill-treating the defendant. So far as direct evidence is concerned, the case is really one of taking the wife’s word against the husband or vice versa.

“ The defendant’s married life has been peculiar. In 1902, or 1903, she appears to have run away with one Diwan Shah. The plaintiff lodged a complaint under section 522, and lost it. In 1904, he instituted a suit for restitution of conjugal rights and appears to have been supported in that suit by Zahir Husain, the present second defendant. In her defence in the suit she totally denied having been married to the plaintiff, and further charged Zahir Husain with the intention of taking away her property, in favour of his son. The suit was decreed, and as defendant declined to submit to the decree, she was put into jail for some months. She had sued the plaintiff unsuccessfully for dower, and had executed a deed of gift of all her property in favour of Diwan Shah. When she got out of jail and joined the plaintiff the latter caused her to bring a suit against Diwan Shah to cancel

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the deed of gift in his favour and for possession of her property. In this suit she was successful, and in 1906, she conferred upon the plaintiff the right to manage her property, though not to alienate it or raise money upon it. After that she seems to have lived with the plaintiff to outward appearance peacefully until the year 1914, when the execution of the sale deed of the 18th of May, was immediately followed by her leaving her husband.

"According to the written statement in this case she has now transferred the whole of her property to Jawad Husain, but in her evidence she alleges that it is still hers. It is in Jawad Husain's name, but she maintains that her son has no interest in it during her life time. Jawad Husain, of course, contends that according to the deed of gift he is owner of the house

"As I have intimated, both plaintiff and defendant are well stricken in years, and it seems clear that the defendant is in the unfortunate position of a woman with property which is desired by a needy husband on the one hand and needy relations on the other. The learned Subordinate Judge thinks that plaintiff at one time beat her, but, he says, that any husband would do that to a wife whose fidelity he suspected. On the whole, the evidence that plaintiff has ill-treated the defendant physically, except, if it be an exception to the extent, is not satisfactory; when giving her evidence she alleged merely that he abused her, and the allegations in her written petitions appear hardly to be made out. That she has been ill-treated by him in other ways, that is to say, mentally, is however reasonably likely; he admits having prevented her relations from having access to her, he did not hesitate to keep her for months in jail and she elected to stay in jail rather than return to him; and it is not likely that she voluntarily suffered him to deal with her property. Similarly, there appears to be reasonable ground for supposing that her health and safety would be endangered if she were compelled to return to him. He and she are on the worst possible terms, and there can be no natural love or affection between them, and in his house she would be completely in his power. There is too much reason for supposing that the plaintiff's desire in pressing the suit is to get hold of defendant's property rather than to have her to live with him, and as she has executed a deed disposing

of this property it is more than likely that he would subject her to distress to induce her to cancel the deed in his favour. It is contended on plaintiff's behalf that defendant is really an unwilling tool in the hands of her relations, and is being opposed by them. That is of course a possibility, but there is no evidence to enable me to say that it is in fact the case.

"There is every reason to suppose that she left the plaintiff voluntarily and that so far at any rate she was in no way coerced by her relations. If she is ill-treated by them in future, she will have only herself to thank. It seems to me that it would not be safe, having regard to all that has happened, to order her to be delivered over to the plaintiff."

Dr. *S. M. Sulaiman*, for the appellant

The Hon'ble Dr. *Tej Bahadur Sapru* and Pandit *Kailas Nath Katju*, for the respondent

PIGGOTT and WALSH, JJ :—This was a suit by a Muhamadan husband for restitution of conjugal rights in which, by our order of the 8th of August last, we thought it necessary to remit certain issues for more specific findings by the lower appellate court. Those findings have now been returned, and we are satisfied that they cannot be successfully assailed on the grounds taken in the petition of objections filed by the plaintiff appellant. We desire to refer to the case of *Armour v. Armour* (1) as laying down sound principles of law which we accept and propose to apply to the facts found in this case by the learned District Judge. We think the findings of the learned District Judge proceed upon evidence and are not vitiated by any erroneous view of the law. We must accept his finding that the defendant has reasonable grounds for believing that her health and safety would be endangered if she returned to her husband's custody, and in our opinion this finding disposes of the appeal. We dismiss the appeal accordingly with costs.

Appeal dismissed.

(1) (1914) 1 A. L. J., 318.

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REVISIONAL CRIMINAL.

1918
January, 25.

*Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir
Pramada Charan Banerji.*

TILAK RAM v. DALIP SINGH.*

*Criminal Procedure Code, section 195—Sanction to prosecute.—Period for
which sanction remains in force—Terminus a quo.*

Under clause (6) of section 195 of the Code of Criminal Procedure the date in which sanction is given is the date of the order of the court which originally granted sanction and not the date of any subsequent order refusing to set it aside. *In re Muthukudam Pillai* (1) followed.

In this case sanction was granted on the 1st of November, 1915, to a litigant in the Revenue Court to prosecute the opposite party for alleged offences under section 471 and other* sections of the Indian Penal Code. On the 11th of May, 1916, this sanction was set aside on the technical ground that the Assistant Collector who had granted sanction had no jurisdiction to do so. The High Court held that this view was incorrect and sent the case back to the Additional District Judge, who then held that a *prima facie* case had been made out why the opposite party should be prosecuted, and accordingly declined to interfere. In July, 1917, a complaint was filed, based on the sanction given on the 1st of November, 1915. An objection was taken that the order granting sanction had expired and therefore the court had no jurisdiction to entertain the complaint. The court before which the complaint was filed accepted this objection; but the Sessions Judge held that the sanction was still in force. The opposite party thereupon applied in revision to the High Court.

Mr. A. H. C. Hamilton, for the applicant.

Mr. Nihal Chand, for the opposite party.

RICHARDS, C J., and BANERJI, J.:—In this case it appears that sanction was granted to a litigant in the Revenue Court to prosecute the opposite party for alleged offences under section 471 and other sections of the Indian Penal Code. The sanction was granted on the 1st of November, 1915, by an Assistant Collector. On the 11th of May, 1916, this sanction was set aside on the technical ground that the Assistant Collector who had

* Criminal Revision No. 1022 of 1917, from an order of E. R. Neave, Additional Sessions Judge of Meerut, dated the 8th of November, 1917.

(1) (1902) I. L. R., 26 Mad., 190.

granted sanction had no jurisdiction to do so. The High Court held that the Additional District Judge was wrong and sent the case back, with the result that the Additional District Judge held that a *prima facie* case had been made out why the opposite party should be prosecuted, and he accordingly refused the application to revoke the sanction given by the Assistant Collector. A considerable time had elapsed in the meantime, and in July, 1917, a criminal complaint was lodged. This was met with the objection that the sanction was out of date and that therefore the court could not take cognizance of the offence. This objection found favour with the court before whom the complaint was filed, but the Sessions Judge held that the sanction was still in force. Whereupon the opposite party applied in revision to this Court. A learned Judge considering the matter of some importance has referred the question to a Bench of two Judges.

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Section 195 of the Code of Criminal Procedure provides that no court shall take cognizance of certain offences committed under certain circumstances without the previous sanction therein referred to. Clause (6) is as follows :—“ Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate, and no sanction shall remain in force for more than six months from the date on which it was given, provided that the High Court may, for good cause shown, extend the time ” In the present case the High Court has never been asked for, nor has it granted, any extension of time. The question which we have to decide is whether under the circumstances of the present case it can be said that the sanction was still in force. If we hold that the sanction was “ given ” on the 1st of November, 1915, it is clearly long since out of date. On the other hand, if we hold that the sanction was “ given ” after the case had gone back to the Additional District Judge and he had refused the application to revoke the sanction granted by the Assistant Collector then the prosecution was begun within time. We think it is impossible to hold on the clear meaning of the words of clause (6) of section 195 that the sanction can possibly be said to have been “ given ” by the Additional District Judge. The

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application before him simply was an application to revoke sanction which had been previously granted, and his order was to refuse to revoke that sanction. It may be said that an opposite party by taking proceedings can always use up the whole six months in applications to the court and thus make the sanction of no avail. There are two answers to this. In the first place, if a party to whom sanction has been given chooses to take advantage of that sanction and lodges his complaint then he will be able to continue the prosecution notwithstanding any applications that the other side may make. It is possible that the court might stay the prosecution pending the decision of an application to revoke the sanction, but the prosecution would nevertheless have been begun within time. In the second place, there is an express power given to the High Court to extend the time for good cause shown. Our attention has been called to two cases of the Madras High Court. In *In re Muthukudam Pillai* (1) a Bench of two Judges expressly held that the sanction in a case like the present is "given" by the court who first granted it and not by the court who subsequently refused to revoke the sanction. A different view was taken by a Bench of the same High Court in *Muthuswami Mudali v. Veem Chetti* (2), and in a more recent case, *The Public Prosecutor v. Raver Unithiri, Marvathar Vittil v. Ambumarar* (3). We prefer to follow the earlier ruling of two Judges. The result is that we allow the application, set aside the order of the Sessions Judge and restore that of the court of first instance.

Application allowed

(1) (1902) I. L. R., 26 Mad., 190.

(2) (1907) I. L. R., 20 Mad., 382

(3) (1914) 26 M. L. J., 511.

FULL BENCH.

1917
December, 15

*Before Justice Sir George Knox, Justice Sir Pramada Charan Banerji;
Mr. Justice Tudball, Mr. Justice Muhammad Rafiq and
Mr Justice Walsh.*

CHUNNI LAL (DEFENDANT) v NARSINGH DAS (PLAINTIFF).*

*Defamation—Libel—Privilege—Civil liability of petitioner for statement
made by him in a petition presented to a criminal court*

A person presenting a petition to a criminal court is not liable in a civil suit for damages in respect of statements made therein which may be defamatory of the person complained against.

In the absence of Statute law in India as regarding civil liability for libel, there is no reason why the English law applicable thereto should not be followed, according to the ruling of the Privy Council in *Waghela Rajsang v. Sheikh Masluddin* (1). *Abdul Hakim v Tej Chanda Mukarji* (2) overruled. *Augada Ram Shaha v Nema Chand Shaha* (3) dissented from.

THE facts of this case were as follows:—

Chunni Lal, the defendant appellant, was being prosecuted for an offence under section 193 of the Indian Penal Code, and he had engaged the plaintiff respondent, who was a pleader, to defend him. For a time Chunni Lal was allowed to remain at large on his own recognizances. On the 22nd of August, 1913, however, he was ordered to find a surety in the sum of one hundred rupees. The plaintiff agreed to stand surety and executed a bail bond. But to make his position quite secure, he asked his client to pay him Rs. 100, which Chunni Lal did. The pleader thereupon applied to be permitted to deposit the one hundred rupees in cash. The Deputy Magistrate being in camp, the pleader was ordered to deposit the money in the Shikohabad Sub-Treasury. The plaintiff did so, but by some mistake the proper number of receipts was not granted. On the 4th of September, 1913, the case under section 193, Indian Penal Code, was taken up. Chunni Lal engaged another pleader and was acquitted. On the 17th of September, 1913, Chunni Lal put in a petition in the Deputy Magistrate's court stating that, as no intimation had been received by the court about the deposit of the hundred rupees, he was not sure that the money had been deposited at all, and

* Second Appeal No. 1473 of 1915 from a decree of L. Marshall, District Judge of Mainpuri, dated the 30th of June, 1915, confirming a decree of Prem Behari, Munsif of Mainpuri, dated the 10th of August, 1914.

(1) (1887) L. R., 14 I. A., 89. (2) (1881) I. L. R., 3 All., 815.

(3) (1896) I. L. R., 23 Cal., 867.

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praying that inquiry be made from the Tahsildar of Shikohabad. Subsequently Chunni Lal saw the District Magistrate and complained orally. The District Magistrate told him to file a complaint. On the 24th of September, 1913, Chunni Lal filed a regular complaint against the pleader, Chaube Narsingh Das, charging him with offences under sections 420 and 409 of the Indian Penal Code (cheating and criminal breach of trust). In the mean time, on the 22nd of September, 1913, a reply was received in the Deputy Magistrate's court from the Tahsildar of Shikohabad to the effect that the money had been deposited by pleader on the 22nd of August, 1913. Chunni Lal, before filing the complaint, did not take the precaution of inquiring from the Deputy Magistrate's court whether any reply had been received from the Tahsildar of Shikohabad. The District Magistrate, without issuing process to Chaube Narsingh Das, held a preliminary inquiry into Chunni Lal's complaint under sections 420 and 409 of the Indian Penal Code, and dismissed it under section 203 of the Code of Criminal Procedure. Chaube Narsingh Das then brought a complaint charging Chunni Lal with defamation, under section 499 of the Indian Penal Code in respect of the statements made by the latter in his petition of complaint dated the 24th of September, 1913. The District Magistrate dismissed Narsingh Das' complaint, holding that the ninth exception to section 499 of the Penal Code covered the case. Narsingh Das applied in revision to the Sessions Judge, who was of opinion that the order dismissing the complaint was wrong and referred the case to the High Court. The High Court (RAFIQ and PIGGOTT, JJ), however, did not agree with the Sessions Judge. The pleader, Chaube Narsingh Das, then brought the present civil action claiming Rs. 1,000 as damages for libel in respect of the statements made by Chunni Lal in his petition of complaint dated the 24th of September, 1913. The court below gave the plaintiff a decree for Rs. 200. The defendant appealed to the High Court.

Babu Piari Lal Banerji, for the appellant:—

The statements complained of are defamatory, but it is submitted that they are absolutely privileged. Because a man may be criminally liable, is he necessarily liable for damages in

a civil action too? In England, he will not be liable in a civil action; absolute privilege will be allowed to him. There is no reason why the law should be different in India.

The difference in this particular instance between the criminal laws of India and England has no effect. Because a man is criminally liable he is not necessarily liable civilly also. Let us take for example, the defence of truth. In England under the Libel Act—as well as in India under the Penal Code—truth in criminal proceedings is a defence only under certain circumstances and within certain well-known limitations. But in a civil action it is complete defence. So, the defence of absolute privilege may or may not be a good defence in criminal proceedings, but as it is a good defence in civil actions in England, it should be so in India too. The fact of a man being criminally liable for a certain act is no test or criterion for determining his liability in a civil action for damages for that act.

The English Law on the subject is to be found in Pollock, *Law of Torts*, 6th Edition, pp. 254 and 257; Halsbury's *Laws of England*, Vol. 18, pp. 678 and 738.

The following are the leading English cases on the subject:—

Munster v. Lamb (1). This was a case of a counsel being sued for defamation. The judgements of BRETT, M. R. and FRY, L. J., are very clear and instructive. This case shows that there is no difference between a witness and a party.

Revis v. Smith (2). This was a case of a witness making statements in an affidavit. In principle there is no difference between this and the case of a party filing a complaint. The case just cited does away with the supposed distinction between *viva voce* statements and those made deliberately.

Henderson v. Broomhead (3). This was a case of a party making statements in an affidavit.

Watson v. McEwan (4); *Hodson v. Pare* (5). This was a case of a petition instituting proceedings like the present.

Bottomley v. Brougham (6), *Lilley v. Roney* (7), *Dawkins v. Lord Rokeby* (8), *Serman v. Netherelift* (9).

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| (1) (1883) 11 Q. B. D., 588. | (5) (1891) 1 Q. B., 455. |
| (2) (1856) 18 C. B., 120. | (6) (1908) 1 K. B., 584. |
| (3) (1859) 4 H. and N., 569. | (7) (1892) 61 L. J., Q. B., 727. |
| (4) (1905) A. C., 450. | (8) (1876) L. R., 7 H. L., 744. |
| (9) (1876) 2 Q. P. D., 53. | |

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Here a witness persisted in making *voluntary* statements, in spite of the fact that the Judge had told him not to make any statement, and refused to listen to him, and had practically discharged the witness. Yet it was held that the man was privileged. It is thus settled that, in England, judge, counsel, witness and party all stand on the same footing. And it is submitted, that the same privilege should be accorded in India too. As to the Indian authorities, the first case is that of *Baboo Gunnesb Dutt Singh v. Mugneeram Chowdhry* (1). The observations relating to the privilege of witnesses in their Lordships' judgement at p. 328 are not *obiter*. Even if they were so, they are entitled to great respect, and no Civil Court can refuse to follow them. In a criminal case it may be different. The case just cited also shows that in actions for malicious prosecution, the tests of the Indian Penal Code are not applied, although a remedy by criminal proceedings under section 211 of the Penal Code is also open. The first case in this Court is that of *Chowdhry Goordutt Singh v. Gopal Dass* (2). It is not of much help, for it held that the proceedings were not judicial. The next case is that of *Tulshi Ram v. Harbans* (3). It is in my favour, although it accords to witnesses a sort of a limited privilege only. The next case is that of *Abdul Hakim v. Tej Chandar Mukarji* (4). This is the only case which is really in favour of the plaintiff. But it has not been followed in a large number of cases. Even Subordinate Courts have refused to follow it and this Court has not censured them. The observations which help the plaintiff are entirely *obiter dicta*. The principle on which they are based is that to determine liability in civil actions also we must go to the Indian Penal Code for guidance. This is not warranted. There is no reason why the principles and tests of the Indian Penal Code should be introduced into a civil action for damages for defamation, especially when the Indian Penal Code is not imported for guidance in any other form of civil action where a criminal remedy is also open, e.g., malicious prosecution. The next case is that of *Dawan Singh v. Mahip Singh* (5). It has

(1) (1872) 11 B. L. R., 321.

(2) Weekly Notes, 1885, p. 301.

(3) N.W.P., H. C. Rep., 1866, p. 33.

(4) (1881) I. L. R., 3 All., 815.

(5) (1888) I. L. R., 10 All., 425.

been supposed by some that MAHMOOD J. has in this case expressed himself as against the view now contended for by me. But that is not so. He only refused to follow the English law of slander, which is highly artificial. But the learned Judge does not refuse to follow the English law as to the absolute privilege of a witness. The judgement has been misunderstood. As a matter of fact, he goes the whole length with BRODHURST, J., so far as the question of the privilege of a witness is concerned. So that as early as 10 Allahabad, the authority of 3 All., 815, (*Abdul Hakim v. Tej Chandar Mukarji*) had been shaken. The next case is that of *Emperor v. Ganga Prasad* (1). There the question was as to the criminal liability of a witness who makes defamatory statements whilst giving evidence. Even on that point RICHARDS, J., differed from KNOX, J. The ruling must be considered to be limited to criminal cases, and is therefore distinguishable. The principal judgement was that of KNOX, J., and he is careful to employ language which cannot be extended to civil actions. The next case is that of *Babu Prasad v. Muda Mal* (2). The case helps me inferentially. The case in 3 All., 815, was not cited nor were the lower courts censured for not following it. It cannot be argued that the cases in 3 All., 815, and 11 A. L. J., 193, are consistent. Such being the state of the authorities in this Court, it cannot be urged by the other side that acceptance of my arguments would disturb any current of decision. My contention that in a civil action for damages for libel, the tests of the Indian Penal Code cannot be applied derives support from the fact that in the well-known Benares caste case, *Bishambhar Das v. Gobind Das* (3), the High Court did not refer to the Penal Code for guidance, nor did the Privy Council. See *Gobind Das v. Bishambhar Das* (4). There is great conflict in the Calcutta Court, but the later rulings are in my favour. Omitting the earlier cases, the first case is *Bhikumber Singh v. Becharam Sircar* (5) which favours the appellant. The case of *Augada Ram Shaha v. Nemai Chand Shaha* (6) is against me. But the reasoning in this case is unsound and incorrect. The opinion that "we do not think it possible that a

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(1) (1907) I. L. R., 29 All., 685.

(4) (1917) I. L. R., 39 All., 561.

(2) (1913) 11 A. L. J., 193.

(5) (1888) I. L. R., 15 Calc., 264.

(3) (1914) 12 A. L. J., 552.

(6) (1895) I. L. R., 23 Calc., 867.

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statement may be the subject of a criminal prosecution for defamation, and at the same time may be absolutely privileged, as far as the Civil Courts are concerned," is too widely stated. The case has been followed up to a certain stage, but later on the tendency has been to ignore it. The case of *Kali Nath Gupta v. Gobinda Chandra Basu* (1) was a criminal case. Besides, it simply follows the case in 23 Calc., 867. The distinction drawn between a witness and a party is obviously erroneous. The Judges base the privilege of a witness on section 132 of the Indian Evidence Act, and the obligation that lies on a witness to answer all questions put to him. But it has been held that the privilege of a witness is much wider, i.e., it extends even to voluntary, absolutely irrelevant and obviously malicious statements. The case of *H. P. Sandyal v. Bhaba Sundari Debi*, (2) is also against me. But that also simply follows the case in 23 Calc., 867. One of the learned Judges, however, does not do so without reluctance. This is the last case which recognizes the authority of 23 Calc., 867. The cases of *Kori Singh v. The King-Emperor* (3) and *Kori Singh v. Mr. J. Finch* (4) were criminal cases and are of no help. The first one, however, shows that there is a difference between a criminal case and a civil action. The case of *Golap Jan v. Bholanath Khetry* (5) is entirely in my favour. In the case of *C. H. Crowdy v. L. O. Reilly*, (6) MOOKERJI, J., cites the American cases on the subject. In all systems of civilised jurisprudence absolute privilege, as contended for here, has been allowed. The leading case in the Madras Court is that of *In re P. Venkata Reddy* (7), in which all the Madras authorities on the subject are collected. The case of *Re Muthusami Naidu* (8) is also in my favour. They are both criminal cases, and the Madras Court has extended the principle of absolute privilege even to criminal cases. The Bombay case of *Nathji Muleshvar v. Lalbhai Ravidat* (9) is entirely in my favour. The case of *Queen-Empress v. Babaji* (10)

(1) (1900) 5 C. W. N., 293.

(2) (1910) 15 C. W. N., 995.

(3) (1912) 17 C. W. N., 297.

(4) (1912) 17 C. W. N., 440.

(5) (1911) I. L. R., 38 Calc., 880.

(6) (1912) 17 C. W. N., 554.

(7) (1911) I. L. R., 36 Mad., 216.

(8) (1912) I. L. R., 37 Mad., 110.

(9) (1889) I. L. R., 14 Bom., 97.

(10) (1892) I. L. R., 17 Bom., 127.

shows that the Bombay Court too has extended the doctrine of absolute privilege to criminal cases also.

The Punjab cases of *Ali Khan v. Malik Varun Khan* (1) and *Kundan v. Ramji Das* (2) are in my favour. The case of *Fateh Muhammad v. The Empress* (3) was a criminal case and has no application to the present case. It is on the same footing as the case in I. L. R., 29 All., 685. Thus, apart from English cases, the balance of authority in India too, I submit, is in my favour, and the recent cases of all the High Courts support me.

Sir *Sundar Lal*, for the respondent:—

The question is whether a person filing a complaint, however groundless, malicious and false, is entitled to the protection of absolute privilege on the ground of any public policy. Under section 37 of the Bengal, N.-W. P. and Assam Civil Courts Act, (Act XII of 1887), whenever there is no statute law, courts in India have to act according to justice, equity and good conscience. This being a civil suit for damages for defamation, for which there is no statute law, the question is whether it is in accordance with justice, equity and good conscience to hold in India, following English case law, that a statement of the kind we are considering in this case is protected. It may be protected in England. But the question is whether the English Law should be followed in India. The facts found in the present case clearly show that the statements made by Chunni Lal in his petition of complaint, especially the one to the effect that the pleader had pocketed the money, were most reckless and made without due care and caution. Is such a man entitled to the protection of absolute privilege? For the purpose of deciding this question, the matter to consider is how far has the wide doctrine of absolute privilege to be found in English Law been followed in India and how far should it be followed by this Court.

So far as Indian Law is concerned, the Indian Penal Code has not accepted the wide principle of English Law. Section 499 of the Code gives only a qualified privilege. Thus, so far as criminal matters are concerned, we have a law enacted by the Indian Legislature which does not accept the English Law in its entirety. Why should we not go to it for guidance, rather than to English

(1) *Punj. Rec.*, 1879, p. 28.

(2) *Punj. Rec.*, 1879, p. 421.

(3) *Punj. Rec.*, 1889, p. 129.

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law, in order to find out what is in accordance with justice, equity and good conscience ? The rule of English law is based on the theory that parties and witnesses must be absolutely unfettered and without fear of civil and criminal liability of any kind. In India, as section 499 of the Penal Code gives only a qualified privilege, parties and witnesses have to be in fear of at least one form of liability, *viz*: criminal, which is the more serious of the two. Thus the whole reason of the English rule disappears so far as this country is concerned. If such persons are liable criminally, there is no reason why they should be protected when a civil action is brought against them. The Indian Legislature has thought it necessary to pass Act XVIII of 1850. If the rule of English law were applicable to this country in its entirety, judicial officers would have been amply protected by it and there would have been no need for this enactment. Then again, there is section 132 of the Indian Evidence Act. That also militates against the view that the English Common Law on the subject is applicable to this country. The question in this country has to be considered not in the light of case-law but in that of principle and legislation so far as it has proceeded in this country.

Mr. A. P. Dube, followed on the same side :—

The rule of English Law, giving absolute privilege, is a rule of adjective law. It takes away jurisdiction; *Bottomley v. Brougham* (1). Therefore, unless it can be held that there is something in the adjective law of India which takes away the jurisdiction of the courts in such matters, the rule of English Law is of no assistance.

The case just cited clearly explains that the doctrine of absolute privilege means that the courts are precluded from inquiring into such matters. It cannot be denied that the present action is a suit of a civil nature, and there is nothing in the law of India which expressly or impliedly bars its cognizance by the courts. Under section 9 of the Code of Civil Procedure, therefore, the plaintiff is entitled to have his suit tried, and the English law has no application. It has been admitted even by writers of text-books on English law that the protection created by the English law for

(1) (1908) 1 K. B., 584.

the sake of honest litigants and persons might also protect dishonest and malicious persons. It is for this Court to consider whether it is not possible to give in this country only a qualified privilege which will protect only honest and innocent persons. In England the rule had its origin in a feeling that the conduct of judges and advocates should not be made the subject of an inquiry by a jury. It has been extended to other persons engaged in judicial proceedings, *e. g.*, witnesses, parties and jurors. No such considerations arise here. Besides, there are some very important differences between Indian and English society which are clearly explained by SPENCER, J., in 36 Mad, 216. The weight of authority in India is in favour of giving only a qualified privilege. He cited and discussed the following cases:—*Gobindhi v. Jodha Bali* (1), *Abdul Hakim v. Tej Chandar Mukarji* (2), *Dawan Singh v. Mahip Singh* (3) (at page 450, judgement of Mahmood, J.), *Babu Mal v. Muda Mal* (4), *Bishambhar Das v. Gobind Das* (5), *Queen v. Pursoram Doss*, (6), *Shibnath Tulaputtro v. Sat Cowree Deb* (7), *Bhikumbhar Singh v. Becha Ram Sircar* (8), *Augada Ram Shaha v. Nemai Chand Shaha* (9), *Kari Singh v. Emperor* (10), *In re Nagarji Trikamji* (11) and *Sullivan v. Norton* (12).

Babu Piari Lal Banerji, was not called upon to reply, but cited *Varden Seth Sam v. Luckpathy Royjee Lallah* (13) and *Waj'ie'a Rajsanji v. Shekh Masluddin* (14).

KNOX, BANERJI, TUDBALL, MUHAMMAD RAFIQ and WALSH, JJ. :—This second appeal arises out of a civil action for damages for defamation, the facts of which are briefly as follows:—

The defendant, who is the appellant before us, was prosecuted in a Criminal Court for an offence under section 193 of the Indian Penal Code. The plaintiff, who is a pleader, appeared to defend him. The court allowed bail and the plaintiff stood surety for the

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| (1) Weekly Notes, 1885, p 204. | (8) (1888) I. L. R., 15 Cal., 264. |
| (2) (1881) I. L. R., 3 All., 815. | (9) (1896) I. L. R., 23 Cal., 867. |
| (3) (1888) I. L. R., 10 All., 425 (450). | (10) (1912) I. L. R., 40, Cal., 433. |
| (4) (1913) 11 A. L. J., 193. | (11) (1894) I. L. R., 19 Bom., 340. |
| (5) (1914) 12 A. L. J., 552. | (12) (1886) I. L. R., 10 Mad., 28. |
| (6) (1865) 3 W. R., C. R., 45. | (13) (1862) 9 Moo. I. A., 308. |
| (7) (1865) 3 W. R., C. R., 198. | (14) (1887) L. R., 14 I. A., 89. |

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defendant to the extent of Rs 100. Not being sure of his client, however, he asked the Court to allow Rs. 100 to be deposited in cash. The prayer was granted. The defendant produced the cash, giving it to the plaintiff, and it was actually deposited on the same date, the 22nd of August, 1913, in the Sub-Treasury at Shikohabad. There was some error in the usual procedure for the depositing of money and the full number of acknowledgements was not issued.

On the 4th of September, 1913, the case was heard and the defendant acquitted. On that date, however, he employed another pleader. On the 17th of September, 1913, he filed a petition stating that no receipt had been issued by the Treasury and he was in doubt as to whether the money had actually been deposited by the plaintiff. He asked for inquiry to be made from the Tahsildar. Inquiry was ordered and made, and on the 22nd of September, 1913, the Court received a reply that the money had actually been deposited on the 22nd of August. Without first inquiring from the court the result of the inquiry ordered, the defendant, on the 24th of September, 1913, filed a written complaint in the court of the District Magistrate charging the plaintiff with having committed the offences of cheating and criminal breach of trust in respect to the sum of Rs. 100.

The District Magistrate issued no process on this complaint, but made a preliminary inquiry and dismissed it on ascertaining the facts as to the deposit. The plaintiff thereupon prosecuted the defendant in a Criminal Court. For reasons with which we are not concerned, the defendant was acquitted.

The plaintiff then filed the suit out of which this appeal has arisen to recover Rs. 1,000 as damages for defamation. The courts below have decreed the claim to the extent of Rs. 200. Hence the present appeal by the defendant.

The plea raised on his behalf is that, in a civil action arising out of facts such as have been found in the present case, the defendant has an absolute privilege and is absolutely protected by the law from a civil action for damages for defamation.

For the plaintiff it is urged that in such a case there is no absolute privilege, but only a qualified privilege, and that as the defendant did not act in good faith, he is not protected. There

being a conflict of rulings on the point, the case has been referred to this Full Bench for decision.

We deem it necessary, in view of certain arguments that have been raised before us in regard to the criminal law of defamation, to emphasize in the forefront of our judgement that we are not here concerned with libel as a criminal offence, but only with the civil wrong and the right to redress in a civil action. The civil and the criminal law and procedure do not in our opinion coincide, but are independent of each other. We may quote as an instance one admitted difference between the civil and the criminal law. In a civil action the plea of mere truth is, if established, a complete defence. In a criminal charge it is not so, for the accused has further to prove the fact that it was for the public good that the imputation was made or published. We therefore restrict ourselves to the civil wrong and the right to redress in a civil action. Next, it is clear (and is also admitted before us) that the English rule of law on the point for decision is well established and beyond discussion, and that under that rule the appellant before us would be absolutely protected. It is unnecessary, therefore, to discuss the English decisions on a principle which has been accepted for generations and has never been questioned in England. It has been recognized by Indian Judges. It had to be conceded before us that the High Courts of Bombay and Madras have applied it without hesitation, and that the latter has even gone to the extent of applying it to criminal cases, on the correctness of which we abstain from expressing any opinion.

There is no Statute in India dealing with civil liability for defamation. We have, therefore, to apply the rule of equity, justice and good conscience. This has been interpreted by the Privy Council in *Waghela Rajsanji v. Shekh Masluddin* (1) to mean the rules of English Law if found applicable to Indian society and circumstances. On behalf of the plaintiff respondent it is urged that in the present instance the rule of English law is inapplicable to the circumstances of this country, and that, whatever may have been the rule applied prior to 1860, the Legislature in introducing the Penal Code in that year did not apply the rule of English Law to criminal cases and may be said, by

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implication, to have amended the civil law. Reliance has been placed on the decision of the Calcutta High Court in *Augada Ram Shaha v. Nemai Chand Shaha* (1) and on the *dictum* in *Abdul Hakim v. Tej Chandar Mukarji* (2).

Reference has also been made to several decisions in criminal cases; but we decline to discuss them, for the reasons already given. In regard to the first part of the argument the learned advocate for the respondent has failed to show us what there is in the circumstances and society of this country that would make it improper or inadvisable to apply the English rule. It is suggested that the mass of the population is uneducated and more impulsive and sensitive and therefore more likely to take the law into its own hands if it cannot get redress for defamation, and that therefore it would not be sound public policy to enforce the English rule. We do not think that these are weighty reasons. The English Law does not seek to protect dishonest parties, witnesses or advocates; but deems it a lesser evil that they should escape than that the great majority of honest parties, witnesses and advocates should be exposed to vexatious actions. Unless it can be said that the great majority of these classes in India is dishonest, there can be no good reason against applying the same rule in this country. Needless to say this has not been urged before us, and in this instance we consider that what is sound public policy in England is equally sound policy in India and that the rule of English Law is in accordance with the principles of justice, equity and good conscience.

* The *dictum* of the Privy Council in the case of *Gunnesh Dut Singh v. Mugneeram Chowdhry* (3) supports us; that in 3 All., 815, is based on vague and indefinite grounds.

We cannot agree with the decision of the Calcutta High Court in *Augada Ram Shaha v. Nemai Chand Shaha* (4). It appears to be based upon the assumption that there was no law of defamation in India before the Penal Code. This is not the case, for there are reported decisions on the subject in this province as far back as 1852. Moreover, the learned Judges applied the test of the Criminal Law to the Civil Law, whereas we hold that the two are independent of each other.

(1) (1896) 1 L. R., 23 Cal., 867.

(3) (1872) 11 B. L. R., 321.

(2) (1881) 1 L. R., 3 All., 815.

(4) (1896) 1 L. R., 23 Cal., 867.

Lastly, the plea that a criminal enactment can be interpreted as amending the civil law by implication stands unsupported. It may be anomalous that a party should be criminally punishable and yet be not civilly liable in a case like the present, but it is not the only anomaly in this branch of the law.

We therefore hold that defamatory words used on such an occasion as is alleged by the plaintiff in this suit are not actionable, on the ground of absolute privilege, and that the present suit fails.

We allow this appeal, set aside the decrees of the court below and dismiss the suit. In view of the circumstances of the case the parties will abide their own costs throughout.

Appeal allowed.

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STAMP REFERENCE.

Before Mr Justice Tudball

ABINASH CHANDRA (PLAINTIFF) v SHEKHAR CHAND AND OTHERS
(DEFENDANTS).*

Act No. VII of 1870 (Court Fees Act), section 7, vi—Suit for pre-emption—Suit partly decreed and partly dismissed—Appeal raising questions both as to true price and as to the right to pre-empt—Court fee

Five villages were transferred by means of one sale deed, the consideration set forth in the deed being Rs. 44,000. In respect of this transaction a suit for pre-emption was brought; but the plaintiff alleged that the true consideration was Rs. 2,500 only. As to two of the villages the suit was decreed, on payment of Rs. 21,000, which was found to be the proportionate part of the Rs. 44,000 assignable to those villages: as to the other three villages the suit was dismissed. The plaintiff appealed (a) as to the price to be paid for the two villages in respect of which the decree was in his favour and (b) in respect of the disallowance of his claim to pre-empt the other three villages. A question having arisen as to the proper court fee payable on this appeal, it was *held* that the appeal was divisible into two clear and distinct parts, and that in respect of (a) the appellant should pay an *ad valorem* fee on the difference between 21/44 of Rs. 2,500 and Rs. 21,000, while in respect of (b) the appellant should pay a court fee calculated according to section 7, vi, of the Court Fees Act, 1870, on five times the Government Revenue of the three villages claimed.

THIS was a question arising out of an appeal in a suit for pre-emption as to the proper court fee payable on the appeal. The facts of the case appear from the following orders by the Court and the officers concerned :—

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* Stamp Reference in First Appeal No. 293 of 1916.

Office report.

“ This appeal arises out of a suit for pre-emption. In the plaint filed in the court below the plaintiff asked for possession by right of pre-emption of certain shares in five villages on payment of Rs. 2,500 the actual sale consideration, alleging that Rs. 44,000 entered in the sale deed was the ostensible amount of consideration. A court fee of Rs. 180 was paid on the plaint on Rs. 3,100, being five times the Government revenue of the shares to be pre-empted. The court below decreed the claim for possession of the property specified in the plaint situate in mauza Parkariar and mauza Cheontaha on condition of the plaintiff's depositing Rs. 21,000 as the proportionate amount of sale consideration in respect of those villages. The claim for possession of the three remaining villages, viz., Rampur, Lachmipur and Jotepur, was dismissed.

“ Against the decree of the court below the plaintiff has filed this appeal, valuing it for purposes of jurisdiction at Rs. 2,500 and for payment of court fee at Rs. 3,100, being five times of the Government revenue of all the five villages, as said above, and paying a court fee of Rs. 180 on the latter valuation. The relief sought in this appeal is that the decree of the court below be varied and the claim decreed *in toto*. A reference to the pleas urged in the memorandum of appeal to this Court will show that the plaintiff not only claims possession of the three villages named above in regard to which the claim has been dismissed, but he also contends that the actual sale consideration of all the properties claimed is Rs. 21,500, and not Rs. 44,000, as found by the court below, and so the claim in respect of mauzas Parkariar and Cheontaha ought to have been decreed on payment of the proportionate amount of the actual sale consideration. Practically there are two reliefs asked for in this appeal viz. (1) to obtain possession of the three villages in regard to which the claim has been dismissed and (2) to reduce the proportionate liability in respect of two villages decreed in plaintiff's favour. As regards (1) the court fee ought to be paid on five times the Government revenue of the three villages viz. Rampur, Lachmipur and Jotepur. According to the plaint, five times the revenue of these three villages is Rs. 1,741 4-0. In regard to (2) the court fee should be paid on the difference between the amount

decreed against the plaintiff appellant and that admitted by him as the actual sale price According to the plaintiff's allegation as to the actual sale consideration the rateable contribution of the value of the two villages decreed should be in proportion to Rs. 44,000 ; 2,500 , 21,000.

" This comes to Rs. 1,193 The value of this relief is therefore Rs. 21,000 *minus* Rs. 1,193 = Rs. 19,807. Adding the two reliefs the value of this appeal should be Rs. 21,548-4-0 and on this valuation a court fee of Rs. 815 is payable A court fee of Rs. 180 having been paid there is therefore a deficiency of Rs. 635 due from the plaintiff appellant in this Court."

To this report Munshi *Haribans Sahai* for the appellant made the following objection :—

" The report is not correct. The nature of the suit has not been changed in appeal and the subject-matter of the dispute between the parties is the right of pre-emption, the value of which for the purposes of court fees is to be determined in the manner directed by section 7, clause vi, of the Court Fees Act. The matter is concluded by the following observation of their Lordships sitting in Full Bench in the case of *Hafiz Ahmad v. Sobha Ram* (1) :—' We are of opinion that where an appeal is preferred in a suit for pre-emption on the ground that the right to pre-empt has or has not been established, as the case may be, no matter what other pleas may be taken, the value of the subject-matter in dispute for the purposes of the Court Fees Act must be determined as in terms provided in article vi of section 7 of the Act. But when the question in appeal relates solely to the amount to be paid by the pre-emptor, then we think that it should be calculated *ad valorem* on the difference between the amounts alleged as the sale price on the one side and on the other.'

" The present appeal not relating solely to the amount to be paid by the pre-emptor the view taken by the Stamp Reporter is legally unsustainable and no additional amount of court fee is leviable."

Taxing Officer's Report :—

" In this case the plaintiff claimed the right of pre-emption of certain shares of five villages on payment of Rs. 2,500, the actual consideration alleged being Rs. 44,000. In regard to three

(1) (1884) I. L. R., 6 All., 468.

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villages the claim was dismissed, and in regard to the other two it was decreed on condition of the payment of Rs. 21,000, the sum of Rs. 44,000 being accepted as the true consideration. In appealing the plaintiff pays a court fee based on five times the revenue of the villages. Office suggests that as regards the two villages Parkariar and Cheontaha, in the case of which the sole question now at issue is the amount of consideration, the court fee should be paid *ad valorem* on the difference between the consideration claimed and that accepted by the lower court. Both office and the learned vakil for the appellant rely on the Full Bench ruling in *Hafiz Ahmad v. Sobha Ram* (1). It is here laid down that when an appeal is preferred on the grounds that right to pre-empt has or has not been established, as the case may be, no matter what other pleas may be taken, the value of the subject-matter in dispute for the purposes of the Court Fees Act must be determined as provided in article vi of section 7 of the Act. But where the question in appeal relates solely to the amount to be paid by the pre-emptor, there it should be calculated *ad valorem* on the difference between the amounts alleged as the sale price on the one side and on the other. The appellant maintains that it is impossible to split up this appeal, that the whole consideration is one, and that the first part of this ruling must apply to the whole. Office, on the other hand, contend that the nature of the appeal is quite different as regards the villages Parkariar and Cheontaha, and that the appeal as regards them must be taxed as laid down in the second part of the ruling quoted. I think that office is right, but as there appears to be no clear ruling as to whether an appeal which, like this, has two distinct parts with two different natures, owing to the form of the decree of the lower court, can be practically treated as two different appeals for court fee purposes, I refer the question for your decision."

TUDBALL, J.—The facts are fully set out in the referring order of the Taxing Officer. The present appeal is divisible into two parts. In regard to the three villages Rampur, Lachampur, and Jotepur, the suit has been dismissed and it has been held that the plaintiff has no right of pre-emption in these villages. In regard

(1) (1884) I. L. R., 6 All., 488.

to Parkariar and Cheontaha the court below has held that the right to pre-empt exists, and it has directed the plaintiff to deposit the sum of Rs. 21,000 as the value thereof. The whole sale deed purported to be for the sum of Rs. 44,000. The plaintiff sought to pre-empt the whole property upon the payment of Rs. 2,500. The court below has held that Rs. 44,000 is the correct amount, and in respect of the two villages Parkariar and Cheontaha it has directed the payment of a proportionate part, namely the sum of Rs. 21,000. The appellant claims to be allowed to appeal on the payment of a court fee based upon five times the revenue of all five villages. The Taxing Officer's opinion is that, the appeal being divisible into two parts, and the sole question which arises in one part of the appeal respecting the two villages being a question of consideration, the appellant must pay an *ad valorem* court fee as laid down in the ruling in *Hafiz Ahmad v. Sobha Ram* (1). In regard to the three remaining villages, as the right to pre-empt is in dispute, the court fee in respect thereto must be calculated according to section 7, clause vi, of the Court Fees Act. On behalf of the appellant it is urged that the question of consideration arises on the whole appeal and as that is not the sole question, inasmuch as the right of pre-emption is in dispute in respect to at least three villages, under the ruling quoted he need only pay court fees on five times the Government revenue, as mentioned above, on the whole estate. In my opinion the appeal is divisible into two clear and distinct parts, and the report of the Taxing Officer is correct. In regard to the two villages of Parkariar and Cheontaha, the court fee will be calculated *ad valorem* on the difference between 21/44 of Rs. 2,500 and Rs. 21,000. The court fee in respect of the other three villages will be calculated according to section 7, clause vi, on the basis of five times the Government revenue. If the appellant so pleases, he may amend his plaint, of which notice will have to be given to the other side, and the office will calculate the court fees after the amendment has been made. I allow three weeks for the making of the amendment and after it has been made a necessary period will be allowed for the payment of any deficiency that may then be found due.

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(1) (1884) I. L. R., 6 All., 488.

Before M. Justice Tudball

RATAN SINGH (PLAINTIFF) v. KHEM KARAN (DEFENDANT).*

Act No VII of 1870 (Court Fees Act), schedule II, article 5, section 7, clause xi—Suit for declaration that plaintiff is an occupancy tenant—Act (Local) No. II of 1901 (Agra Tenancy Act), section 95—Court fee

In a suit under section 95 of the Agra Tenancy Act, 1901, to declare the plaintiff's status as an occupancy tenant the plaintiff's memorandum of appeal should bear a court fee of eight annas as provided in article 5 of schedule II to the Court Fees Act: section 7, clause xi, of the Act does not apply to such a suit.

THIS was a question arising in an appeal in a suit under section 95 of the Agra Tenancy Act, 1901, for a declaration of the plaintiff's status as an occupancy tenant, as to the proper court fee payable both on the plaint and on the memorandum of appeal. The facts of the case appear from the following order of the Court and the officers concerned:—

Office Report:—

"The suit being for declaration of the nature of tenancy under section 95 of the Tenancy Act a court fee of Rs 10 must be paid by the plaintiff appellant on the appeal, irrespective of valuation, as held by this Court in S A. No 475 of 1912, dated the 16th of January, 1913, *Piari Lal v Ganga Ram*. This appeal is therefore insufficiently stamped by Rs. 7-12-0. There is also a deficiency of Rs 9-8-0 due from the defendant respondent on his appeal to the lower appellate court."

The following objection was made by Babu *Piari Lal Banerji*:—"The Stamp Reporter's report absolutely overlooks the provision of the Court Fees Act, schedule II, article 5. A court fee of 8 annas only was payable on the memorandum of appeal. The earlier case referred to by the Stamp Reporter contains no reference to this provision, consequently the decision cannot be accepted as it is contrary to an express provision of law."

Office Report:—

"With reference to the objection taken by the learned vakil for the plaintiff appellant that a plaint or memorandum of appeal in a suit brought under section 95 of Tenancy Act is governed by article 5, schedule II, of the Court Fees Act, I have grave doubts. This question came up once before when

* Stamp Reference in second Appeal No. 95 of 1913.

Mr. BURKITT was the Taxing Officer. He referred a similar question to the Hon'ble Mr. Justice AIKMAN as Taxing Judge, who held that a memorandum of appeal in a suit under section 95 of the Tenancy Act must be stamped with a fixed fee of Rs. 10. The same view was taken by the Hon'ble Sir H. D. GRIFFIN as a Judge of this Hon'ble Court. (Both rulings are put up). If you think that these rulings are not binding in this case in view of the objection taken by the appellant's vakil, the matter may be referred to the Hon'ble Taxing Judge for a third decision."

Taxing Officer's Report :—

"This is a suit under section 95 of the Tenancy Act for declaration of occupancy rights, on which a court fee of 8 annas has been paid. Office objects that the fixed fee of Rs. 10 for a declaration without consequential relief should be paid, while the appellant points to article 5 of schedule II of the Court Fees Act. I see no reason why the suit should not be held to come under that article both in the lower courts and in this Court, but as the two rulings placed below, though for some reason they do not consider this specific question, appear to be against me, I put the case up for your orders under section 5 of the Court Fees Act "

TUDBALL, J —This is an appeal in a suit brought by the appellant for a declaration under section 95 of the Tenancy Act, that he has occupancy rights in a certain holding. The suit is purely a declaratory suit. The question is what is the court fee payable on the appeal. *Prima facie* the suit falls clearly within schedule II, article 5, of the Court Fees Act, which lays down that on a plaint or memorandum of appeal in a suit to establish or disprove a right of occupancy a court fee of eight annas should be paid. The only difficulty in the case arises by reason of two previous Judges of this Court having in similar cases directed that a fee of Rs. 10 was payable. In neither of these decisions was schedule II, article 5, apparently considered. The suit is not one to which section 7, clause XI, of the Court Fees Act is applicable. As I have said above, it is purely a declaratory suit, and nothing more, in which the plaintiff seeks to establish that he has a right of occupancy. In my opinion the law is plain and the appeal is governed by schedule II, article 5, of the Court Fees Act and the court fee payable is eight annas according thereto. I so direct

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APPELLATE CRIMINAL.

Before Justice Sir Pramada Chandra Banerji and Mr Justice Piggott.

EMPEROR v. GAURI SHANKAR.*

Act No XLV of 1860 (Indian Penal Code), section 302—Murder—Poisoning by arsenic—Intention—Knowledge

A person who administers a well-known poison like arsenic to another must be taken to know that his act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and, if death ensue, he is guilty of murder, notwithstanding that his intention may not have been to cause death. *Queen Empress v. Tulsha* (1), *King-Emperor v. Bhagwan Din* (2) and *King-Emperor v. Gitali* (3) referred to.

THIS was an appeal from a conviction of murder and a sentence of death passed upon one Gauri Shankar Bhat by the Sessions Judge of Cawnpore. The facts of the case are fully stated in the judgement of the Court.

Mr. E. A. Howard, for the appellant

The Government Advocate (Mr A. E. Ryves), for the Crown.

BANERJI and PIGGOTT, JJ :—In this case Gauri Shankar Bhat, aged 58 years, has been found guilty by the learned Sessions Judge of Cawnpore on a charge framed under section 302 of the Indian Penal Code, the case against him being that he caused the death of a little boy named Parmanand by arsenical poisoning. The record is before us for confirmation of the sentence of death and a petition of appeal has been presented by Gauri Shankar through the Superintendent of the Jail in which he is confined. We have also had the advantage of hearing the case argued on behalf of the appellant by a learned advocate of this Court. The story for the prosecution is that, on the 23rd of September last, in the course of the forenoon, the accused asked two little boys, Parmanand and Durga, the sons of his neighbours Lala and Jawahir Kurmis, to come to him at a certain temple in order to study. The accused's own boys were there studying their books just outside the temple. It is alleged that Gauri Shankar offered some sugar to the boys, Parmanand and Durga, taking precautions at the same time that his own sons should not receive any share

* Criminal Appeal No 41 of 1918, from an order of E. H. Ashworth, Sessions Judge of Cawnpore, dated the 2nd of January, 1918.

(1) (1897) I. L. R., 20 All., 143.

(2) (1903) I. L. R., 30 All., 568.

(3) (1903) I. L. R., 31 All., 143

of it. The boys ate the sugar on the spot and, after some time, they were both taken ill with vomiting and purging. They were carried to the hospital, and the first report was made at the police station of Derapur on the 24th of September at 1 p.m., that is to say, within about 24 hours of the occurrence. In this report Lala, the father of the boy Parmanand, plainly accused Gauri Shankar of having given the two boys some poisonous substance in sugar. He did this on the strength of the statements made to him by the boys themselves. The boys were treated at the hospital, and it was apparent that the case of the younger of the two, Parmanand, who was only about nine years of age, was the more serious, and on the 24th of September, the statement of Parmanand was recorded by the Tahsildar Magistrate. It is to the effect already explained. It alleges that Durga and Parmanand had been sent to the temple by their mother at Gauri Shankar's instance, that they were given sugar to eat, that they complained at the time that it had a curious taste, but were encouraged by the accused to eat it, and that they were taken ill shortly afterwards. The parents of the two boys removed them from the hospital on the morning of the 25th of September, perhaps injudiciously so far as regards Parmanand. The result was that, while Durga recovered, Parmanand died on the 26th of September. The subsequent autopsy, taken in connection with the report of the Chemical Examiner, puts it beyond doubt that death was the result of arsenical poisoning. The hospital assistant, who treated both the boys, gives evidence to the same effect. The symptoms observed by him were those of arsenical poisoning and he suspected arsenic from the first.

The evidence on the record is not voluminous, but it seems straightforward and reliable as far as it goes. Musammat Jasoda is able to prove that Parmanand was sent to Gauri Shankar at the temple, at the latter's express request, and that when he returned home about noon he was vomiting and soon became seriously ill. The most important evidence in the case is the statement of the boy Durga. He says that he was given sugar by the accused at the temple along with Parmanand, that they both complained of the sugar tasting bitter, but the accused re-assured them, saying that there was pepper in it. There is one slight discrepancy

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between his statement and the dying declaration of Parmanand. According to the latter the boys were taken ill at the temple and had both of them vomited before they left it. According to Durga he was able to go away and visit his house and another place, and had also eaten two *puris*, before he was taken ill. On a consideration of the evidence given by Lala, the father of Parmanand, and by Jawahir, the father of Durga, it seems probable that some confusion of memory on the part of the boy Durga is responsible for the discrepancy. The evidence of Lala as to what he was told by Parmanand clearly supports the version in the dying declaration. The point, however, does not seem of material importance, whatever the explanation of the discrepancy may be.

There is clear evidence of motive, although it may fairly be argued on the accused's behalf that the motive is not a strong one for the commission of such an offence as murder. There was a criminal prosecution pending against Gauri Shankar and the case was down for hearing before the Tahsildar Magistrate on the 24th of September. Lala had been active in arranging for the prosecution and was the most important witness in the case. Jawahir, father of Durga, had also been summoned as a witness. In the result Lala was unable to attend because he was waiting upon his sick son, and the complaint was dismissed without any regular trial, the Magistrate apparently accepting a statement made to him by Gauri Shankar and not considering himself called upon to make further inquiry in the absence of the principal witness for the prosecution.

The accused sets up no defence worthy of consideration, either in the court below or in the petition of appeal which he has addressed to us. He denies all the facts alleged against him. He says he was not in the village at all on the 23rd of September and that the boys never came to him at the temple. In his petition of appeal to this Court he goes so far as to suggest that the parents of the two boys were so seriously at enmity with him that they administered poison to their own children in order to get him into trouble. A defence of the sort certainly does not help the accused. The assessors, as well as the learned Sessions Judge, were satisfied that the prosecution evidence was reliable and that Gauri Shankar had certainly administered arsenic to

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these two boys with the intention to make them ill. We have felt called upon to consider carefully the question as to the precise nature of the offence thereby committed by the accused. The learned Sessions Judge passes over the point somewhat lightly, with the remark that the accused must have known that he was likely to cause the death of Parmanand by giving him arsenic. The question requires to be considered somewhat more carefully with reference to the provisions of sections 299 and 300 of the Indian Penal Code. With regard to the former of these sections, we think there can be no doubt that Gauri Shankar intended to cause bodily injury to the two boys and that the bodily injury which he intended to cause by the administration of arsenic was of a kind likely to result in death, specially in the case of a little boy about nine years of age. Further, we are quite prepared to hold that in administering arsenic to these boys he knew that he was likely thereby to cause death. When we come to consider the provisions of section 300, clause (2), it becomes evident that the present case is one which lies very much on the boundary line. Somewhat similar questions have had to be considered by this Court in cases of *dhatura* poisoning and there has been some conflict of authority, as may be seen from the following cases:—*Queen-Empress v. Tu'sha* (1), *King-Emperor v. Bhagwan Din* (2) and *King-Emperor v. Gutala* (3).

Each case must of course be decided upon its own facts, but it seems a grave matter to hold that a man of the accused's age, administering a substance like arsenic, with the effects of which the agriculturist population of Northern India is well acquainted, to a boy of Parmanand's age, and actually causing his death thereby, is to be found guilty of any offence short of murder, even though his intention at the time may not have been (and probably was not) to cause the death of the child. Taking the provisions of the section in question as applicable to the facts of the case, we think we are bound to hold that Gauri Shankar, in committing the act proved against him, knew it to be so imminently dangerous that it must in all probability cause to the boys such bodily injury as is likely to cause death. The case therefore just falls within the definition of the offence of murder.

(1) (1897) I. L. R., 20 All., 148. (2) (1908) I. L. R., 30 All.

(3) (1908) I. L. R., 31 All., 148.

Regarding it, however, as a case standing very much upon the border line, and accepting, as we do, the conclusion that the intention was not to cause the death of either of the boys, we do not think it necessary in this case to pass the severer sentence provided by law. We so far accept the appeal of Gauri Shankar that we set aside the sentence of death passed upon him, but affirm his conviction. We direct that he undergo transportation for life with effect from the 2nd of January, 1918, the date of his conviction in the Sessions Court.

Sentence modified

REVISIONAL CRIMINAL.

Before Mr. Justice Walsh

SUNDAR NATH v. BARANA NATH *

Criminal Procedure Code, section 145—Government of India Act, 1915, section 107—Order under section 145 of the Code of Criminal Procedure made by a magistrate duly empowered to act under Chapter XII of the Code—Revision—Jurisdiction of High Court

When proceedings are in intention, in form and in fact proceedings under Chapter XII of the Code of Criminal Procedure, and are taken by a magistrate duly empowered to act under that chapter, the High Court has no power to send for the record of those proceedings, either under the Code of Criminal Procedure or under the Government of India Act, 1915, *Matukdhar Singh v. Jassi* (1) followed. It is, however, open to a party in such a case to satisfy the High Court that property of which he is entitled to possession has been dealt with by an order which has no legal authority at all, and he may do so by an affidavit or in any other reliable manner, and thereby invoke the superintending power of the court.

THIS was an application in revision from an order passed under chapter XII of the Code of Criminal Procedure by a magistrate of the first class. The magistrate found that a dispute likely to cause a breach of the peace existed in respect of certain immovable property belonging to a *math*, between two rival claimants to the *gaddi*, Sundar Nath and Barana Nath. After a lengthy inquiry he came to the following finding:—

“After considering all the evidence on the record, I am unable to satisfy myself whether any and which of them (the claimants) was in possession of the whole subject of dispute, and it has

* Criminal Revision No. 83 of 1918, from an order of Bisheshwar Prasad, Magistrate, First Class, of Gorakhpur, dated the 2nd of January, 1918.

(1) (1917) I. L. R., 39 All., 612.

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not been shown also that any party is in decidedly complete possession of a part of the subject of dispute. I attach the whole subject of dispute under section 146 of the Code of Criminal Procedure. viz., the lands and grain in Ubri Chauk, till a competent court has determined the rights of the parties to it and its possession." Against this order Sundar Nath applied in revision to the High Court. The application did not purport to be filed under any particular section of any particular Act, but contained the following grounds :—

"(1) Because the learned magistrate had no jurisdiction to proceed under section 145, Criminal Procedure Code, inasmuch as there were no proper parties before him.

(2) Because Barana Nath being a trespasser, his possession, even if proved, would not be recognized in law, and he cannot take advantage of the provisions of chapter XII of the Code of Criminal Procedure.

(3) Because the magistrate has not exercised his jurisdiction and made an order in accordance with section 145, Criminal Procedure Code, and maintained the party who had the title and possession both in his favour in possession.

(4) Because in any view, the order attaching the property and adding the various riders to his order imposing obligations on Barana Nath is contrary to law and improper on the merits."

Babu *Satya Chandra Mukerji*, for the applicant.

WALSH, J.—I have no power to send for the record in an application for revision relating to proceedings under Chapter XII.

Sub-section (3) of section 435, Criminal Procedure Code, absolutely prohibits that course. The law as laid down by the general current of authorities in this province is that the superintendence section, which is now section 107 of the Government of India Act, cannot be invoked so as to question proceedings which purport to be proceedings lawfully taken by a magistrate under Chapter XII. It is well recognized that there is an irreconcilable difference of opinion on this point between some of the High Courts, notably two recent judgements, one delivered by my brother KNOX and one delivered in Patna by the former Chief Justice of the Patna High Court based upon the course of authorities. It is obvious that, having regard to the view established in this Province,

it is difficult to question proceedings of this kind at all. It has been said that proceedings which purport to be under Chapter XII may be improperly taken, improperly brought or conducted, and therefore may be treated as if they were no proceedings under the Chapter. This view is not a sound one and has been frequently dissented from—even by the Privy Council in cases of awards, where the arbitrators, so long as they act within their jurisdiction, are masters of the situation. It has been sought by persons trying to get rid of an award to say that, if the arbitrators have gone wrong either in law or in procedure or something of that kind other than misconduct, although there is no appeal, the award is bad and therefore no award at all. In the same way it is sought to argue that proceedings under Chapter XII, where for example, all the proper parties are not required to attend court and so forth, being proceedings which are defective and therefore bad, may be treated as though they were no proceedings at all. I think it is impossible to give effect to this view, and there is the further difficulty, as pointed out by KNOX, J., that this cannot be determined without sending for the record. This is just what this Court cannot do.

On the other hand, there is the difficulty in the other point of view, viz., that though the Legislature has vested in this Court a complete discretionary power of superintendence to check irregular proceedings of inferior courts which may result in serious injury or injustice, if the view which I have just stated is correct—the view with regard to the sending for records or otherwise inquiring into proceedings under Chapter XII,—the jurisdiction of this Court to superintend proceedings under Chapter XII may become a dead letter. I think that this is not necessarily so. There is at any rate one way in which it seems to me both views may be reconciled. If proceedings totally without legal foundation or legislative authority are taken by a magistrate in the name of proceedings under Chapter XII, but not seriously purporting to be taken under, or to comply with the provisions of that Chapter, and this Court is satisfied of that fact by reliable evidence, then I think there is clearly a case for interference. I myself interfered in one case which seemed to be a palpable and serious misunderstanding of the powers conferred by this section, where

the magistrate had not even had a report which dealt with any question of the breach of peace, so that the legal foundation for his authority had never been laid, and in interfering in that case I adopted the dictum of Sir JOHN STANLEY, who seemed to think that the superintendence section could be applied to any circumstances to which revision would apply if it had not been expressly excluded

Somehow or other in that case, I do not know how, the circumstances were before me, because the record had been sent for and the application had been admitted. It is always open to a party in such a case as this to satisfy the High Court that the property of which he is entitled to possession has been dealt with by an order which has no legal authority at all, and he may do so by an affidavit or in any other reliable manner, and thereby invoke the superintending power of the court; but I do not think he can ask this Court to interfere in revision or to send for the record, merely by showing that on the face of the judgement the magistrate has neglected or misinterpreted some of the provisions of the Chapter.

The application is rejected.

Application rejected.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

L. W. ORDE (PLAINTIFF) v. THE SECRETARY OF STATE FOR INDIA
IN COUNCIL (DEFENDANT).*

Act No. I of 1894 (Land Acquisition Act), sections 23, 49—Principles of assessment of compensation—Land forming part of compound of house, but actually in possession of tenants with occupancy rights.

The owner of a house with a compound attached to it let out a large part of the compound to agricultural tenants whom he allowed to acquire occupancy rights therein. *Held*, on a question arising as to the principle of assessing compensation for this portion under the Land Acquisition Act, 1894, that, so far as the owner's interest was concerned, compensation was properly calculated at so many years' purchase of the annual profits actually received by the owner at the time of the sale. The owner could not, in the circumstances, be allowed to claim compensation as for a building site. *Bombay Improvement Trust v. Jalbhoy Ardeshr* (1) referred to

* First Appeal No. 849 of 1915, from a decree of L. Johnston, District Judge of Meerut, dated the 11th of May, 1915.

(1) (1909) 1. L. R., 38 Bom., 433.

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For the purposes of this report the facts of the case may be briefly stated as follows : The appellant owned a house with a compound surrounding it in the city of Meerut. He had let portions of the compound to agricultural tenants who had acquired occupancy rights therein, and Government revenue was assessed on such portions. There were houses and other buildings in the vicinity of the compound. Under the Land Acquisition Act, I of 1894, the Government acquired for building purposes a plot, measuring about $9\frac{1}{2}$ bighas, out of the said compound. The sum awarded to the appellant for compensation was calculated at 16 years' purchase on the net rent income of the plot, and it worked out at about Rs. 213 a bigha, exclusive of the value of a well and of the 15 per cent. allowance. A further sum of Rs. 1,022 odd was paid as compensation to the occupancy tenants of the plot, and this came to about Rs. 108 per bigha.--The appellant objected, *inter alia*, that he ought to have been allowed the full market value of the land considered as a building site in that locality, and that action should have been taken under either section 49 or section 23 (1) 'thirdly' of Act No. I of 1894. The District Judge, upon a reference, came to the finding that the value of land for building sites in that locality was at least Rs. 500 per bigha, but as the land in question was hampered by the existence of the tenants' occupancy rights it had no value, other than the value calculated on its rent income, to a person who could not extinguish those occupancy rights. The District Judge further held that section 49 had no application inasmuch as the compound had not been kept up as such, but let out to tenants, who had been allowed to acquire rights of occupancy. Except in a matter of slight detail the District Judge maintained the award. The appellant appealed to the High Court.

Babu *Sital Prasad Ghosh*, for the appellant, contended that the District Judge had proceeded on an erroneous principle in ascertaining the market value of the land. He relied upon the case of *Kailas Chandra Mitta v. Secretary of State* (1) and upon the observations of BATCHELOR, J., in the case of *Bombay Improvement Trust v. Jalbhoj Ardeshir* (2) as to the true meaning of

(1) (1910) 18 Indian Cases, 638; 17 C. L. J., 34.

(2) (1909) I L. R., 83 Bom 483 (486).

"the market value of the land" in section 23 of the Land Acquisition Act. As to the proper method of ascertaining the market value of agricultural lands situated within a municipal area, which were in the possession of occupancy tenants, he relied on the ruling in *The Collector of Dacca v. Hari Das Bysak* (1) and contended that the appellant landlord was entitled to the difference between the value of the land which might be paid by a willing purchaser if it were not in the possession of occupancy tenants and the amount actually awarded to the latter by the Collector. On the Judge's own findings the appellant was entitled to the difference between Rs. 500 and Rs. 108 per bigha. He relied further on the case of *Dhani v. The Superintendent of Dehra Dun* (2) as to the value of the land in question as a building site as disclosed by the evidence on the record. He also submitted that enhanced compensation on the ground of damage from severance of the land in question from the rest of the compound should have been allowed.

Mr. A. E. Ryves, for the respondent, was not called upon.

Piggott and WALSH, JJ.:—This is an appeal in a land acquisition case. The plot of land in question is situated at Meerut and is required by Government for the purpose of a boarding-house in connection with an important school. The owner objected to the District Judge against the sum awarded by the Collector, but his objections failed, and he has appealed to this Court against the order of the District Judge. The memorandum of appeal before us raises three points, two of which may be briefly disposed of. The plot of land in suit forms part of a compound appurtenant to a house owned by the appellant, and the point as taken in the memorandum of appeal before us is that the District Judge has erred in refusing to enforce in favour of the appellant the provisions of section 49 of the Land Acquisition Act (No. I of 1894), according to which the appellant was entitled to claim that the entire compound should be acquired. As a matter of fact the point has not been argued before us precisely in this form. It has rather been contended that the provisions of section 23, clause (1) (thirdly) have been overlooked by the court below, and that the compensation awarded should have been increased upon an estimate of the damage presumably

(1) (1912) 14 Indian Cases, 163

(2) Weekly Notes, 1890, p. 129.

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sustained by the appellant in consequence of the severance of this parcel of land from the rest of the compound. If we thought that injustice had been done to the appellant in the court below, merely because he had failed to make it sufficiently clear by his pleadings whether he was desiring to claim his remedy under section 49 or under section 23 aforesaid, we should not have felt that there was any technical objection in the way of our doing substantial justice. We find that this point has been considered in all its bearings and has been disposed of by the learned District Judge. The fact is that, although the land in suit may be spoken of in a sense as forming part of the compound of a house, the area in question has not been kept up as a compound. Both the plot of land in suit and the adjoining area have been brought under cultivation, and occupancy tenants are in cultivating possession of the same. Under these circumstances it does not appear that any case is made out for a claim for enhanced compensation on the ground of damage from severance. The third plea in appeal is as to the alleged under-valuation of the well situated on the plot of land in suit. It is sufficient to say about this that the learned District Judge was right in remarking that, on the materials available on this record, there was no case made out for increasing the sum awarded by the Collector under this head. There remains the more substantial plea taken in the second paragraph of the memorandum of appeal. It is contended that the land in question, although at present under cultivation and held by occupancy tenants, has a value as a building site which has been entirely disregarded by the court below. We have been referred to the case of *Bombay Improvement Trust v. Jalbhoy Ardeshir* (1), where the principles applicable to the acquisition of land in respect of which there exists more than one interest have been discussed and laid down. We do not see that these principles have been overlooked by the court below. The learned District Judge has taken into consideration what the market value of this land might be, if it were vacant and available for building purposes. He has estimated its value from this point of view at Rs. 500 a bigha. The memorandum of appeal before us seems to accept this valuation as more or less adequate from the point of view on which it proceeds. In

(1) (1909) L. L. R., 33 Bom., 433.

argument our attention has been drawn to portions of the evidence from which it might be inferred that even this sum of Rs. 500 a bigha was an under-valuation, but on the evidence as a whole there seems no reason why it should not be accepted as far as it goes. As the learned District Judge, however, points out, the difficulty of this case lies in the fact that the land in suit was not at the disposal of the appellant for sale as a building site. Any one desiring to acquire it for that purpose would have to deal, not merely with the appellant, but with the occupancy tenants, who have vested rights not transferable except under stringent limitations as laid down in the Tenancy Act. Taking this matter into consideration, the learned District Judge has come to the conclusion that the value of this land to the appellant himself does not exceed the sum which has been allowed by the Collector, calculated on the basis of so many years' purchase of the annual profits actually derived by him from it at the present time. We have been asked to consider what has been actually paid by Government under the orders of the Collector to the occupancy tenants for the purchase of their rights; but the occupancy tenants accepted the Collector's valuation and their case was not before the court below. Had the occupancy tenants given evidence in the present case, and established the fact that they would have been prepared at any time to surrender their rights to their proprietor for the time being, in return for the sum which was awarded to them as compensation by the Collector, there might have been some basis for the contention that the award in favour of the present appellant should be increased by the difference between the market value of the land as a building site, calculated at the presumed rate of Rs. 500 a bigha, and the sum total of the compensation awarded by the Collector to the appellant and to the occupancy tenants. There is, however, no such evidence on the record, and the mere acquiescence by the occupancy tenants in the Collector's award by no means suggests, as a necessary inference, the fact that they would not have stood out for a higher price if they had found themselves bargaining with a proposed purchaser of the proprietary rights. It seems, therefore, that no cause has been shown for interference with the order of the court below. We dismiss the appeal with costs.

Appeal dismissed.

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REVISIONAL CRIMINAL.

Before Mr. Justice Piggott.

EMPEROR v. INDAR AND OTHERS *

Criminal Procedure Code, sections 110 (f) and 117—Security for good behaviour—Evidence of general repute not admissible when the case for the prosecution rests on section 110 (f)

In a proceeding under section 110 of the Code of Criminal Procedure where the basis of the Court's order is clause (f) of that section, the fact that the person against whom the proceeding is taken is so desperate and dangerous as to render his being at large without security hazardous to the community is not a fact which under section 47 of the Code can be proved by evidence of general repute.

In this case Indar, Jhabbu Lal and Bhopal, a father and two sons, had been required by a Sub-Divisional Magistrate to give security to be of good behaviour for a period of one year under the provisions of section 110 of the Code of Criminal Procedure. They appealed to the District Magistrate, who dismissed their appeal. They thereupon applied in revision to the High Court.

Mr. A. H. C. Hamilton, for the applicants

The Assistant Government Advocate (Mr. R. Malcomson,) for the Crown.

PIGGOTT, J. :—In this case Indar, Jhabbu Lal and Bhopal, a father and two sons, have been required by a Sub-Divisional Magistrate to give security to be of good behaviour for a period of one year under the provisions of section 110 of the Code of Criminal Procedure. An appeal against that order has been dismissed by the District Magistrate. The case is before me on an application for revision in respect of these two orders. I have been through the record and I am quite satisfied that the orders complained of are illegal, on more than one ground, and cannot be affirmed. The order of the District Magistrate is perfectly clear and straightforward and shows beyond possible doubt the grounds upon which the prosecution of these men for bad livelihood has proceeded and the order against them passed. There was a dacoity at the house of one Ram Dayal, in the course of which the said Ram Dayal was murdered. Information was

* Criminal Revision No 795 of 1917, from an order of C L Alexander, District Magistrate of Farrukhabad, dated the 27th of July, 1917.

forthcoming to the effect that this dacoity had been organized by Indar and that he and his sons, Jhabbu Lal and Bhopal, had taken part in it. The three men were placed on their trial along with others, charged with having taken part in this dacoity and in the murder of Ram Dayal. They were acquitted by the Sessions Court. The present proceedings are an attempt to prove by hearsay evidence what the prosecution were unable to prove by direct evidence at the sessions trial. The learned District Magistrate says quite frankly that he is satisfied by the evidence on the record that Indar, Bhopal and Jhabbu Lal had got up the dacoity at the house of Ram Dayal. There is practically no legal evidence to this effect on the record. If it is alleged against a person, even in a proceeding under section 110 of the Code of Criminal Procedure, that he on a certain occasion committed a particular offence, that fact must be proved by relevant evidence. It is not at all the same thing as proving by evidence of general repute that a man is a habitual offender. Moreover, in the present case the preliminary order drawn up by the Magistrate shows clearly that the prosecution were not prepared to undertake to prove, by evidence of general repute or otherwise, that these men were habitual robbers or habitual receivers of stolen property. The case against them was that they were so desperate and dangerous as to render their being at large without security hazardous to the community. This is not a fact which under section 117 of the Code of Criminal Procedure can be proved by evidence of general repute. I do not say that in a proceeding of this sort evidence of general repute may not be offered in support of an allegation that a person against whom proceedings have been taken is habitually a robber or habitually commits extortion, and that the court may not be asked at the same time to consider whether this evidence of the man's general repute, read in connection with direct evidence establishing definite facts against him, may not justify a conclusion that he is a desperate and dangerous character and within the scope of clause (f) of section 110 of the Code of Criminal Procedure. If, however, it is intended to conduct a prosecution on these lines, the accused should have fair notice of the fact in the preliminary order drawn up against him. The form of the

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preliminary order passed in the case clearly shows that those responsible for the conduct of the prosecution were not prepared to ask the Court to find that these men were habitual robbers or habitual receivers of stolen property. For all these reasons I am quite satisfied that the orders complained of cannot be sustained. I set aside the order of the Sub-Divisional Magistrate and discharge Indar, Bhopal and Jhabbu Lal. If they have furnished the securities required, their sureties will be discharged and their own recognizances cancelled. If they are in custody for failure to furnish security, they must be at once released.

Order set aside.

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APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh

GANESHI LAL (PLAINTIFF) v. BABU LAL AND OTHERS (DEFENDANTS) *

Hindu Law—Partition—Right of a third party to half of the property partitioned subsequently established by suit—Right of original parties to re-partition.

One of two brothers sued the other for partition of what they alleged to be the joint family property. The suit was compromised, and a partition was effected which was embodied in a decree. Subsequently, however, a cousin of the parties established by suit his title to one half of the family property which had been thereby divided between the two brothers. *Held* that it was open to the two brothers—if not *eo nomine* to re-open the partition already effected—at any rate to ask the court to adjust as between them the loss occasioned by the success of their cousin's suit. *Ma uti v Ramu* (1) referred to.

GANESHI LAL and Babu Lal were brothers. In 1910 Babu Lal sued Ganeshi Lal for partition of the joint family property, namely a number of houses in Pilkhwa in the Meerut district. Ganeshi Lal in his defence stated that there was another item of joint family property, namely a "shop" at Landour (Mussoorie), which also should be included in the partition. The parties entered into a compromise, and on the 21st of December, 1910, a decree was passed in accordance therewith. By this decree one-half of a large house was allotted to Babu Lal and the other half to Ganeshi Lal; and of the smaller houses, some were allotted to Babu Lal and others to Ganeshi Lal, and one was left in their

* First Appeal No. 291 of 1916 from a decree of L. R. Nayak, Subordinate Judge of Dehra Dun, dated the 11th of July, 1916.

(1) (1905) I L R 21 Bom, 301.

joint possession. The effect of the decree upon the "shop" at Landour was a matter of controversy.

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In 1914 Khairati Lal, a cousin of the two brothers, brought a suit against them claiming title to one-half of the family property and asking for possession by partition of his half share out of the whole of the property dealt with in the suit of 1910. The two brothers denied that Khairati Lal had any title. The court found in favour of Khairati Lal, and on the 3rd of February, 1915, decreed his claim. The decree awarded him two of the smaller houses which had been allotted to Babu Lal by the partition of 1910, and also that half of the large house which had been allotted to Ganeshi Lal. It appeared that at the time of the litigation of 1910 the two brothers were acting under a *bona fide* mistake as to their being the sole owners of the joint family property, and were unaware of the existence of Khairati Lal's title.

The present suit for partition was brought by Ganeshi Lal on the ground that in consequence of Khairati Lal's suit and the decree passed therein he was entitled to re-open the question of the distribution of the property effected by the partition of 1910, including the "shop" at Landour, it was not specifically alleged, however, that the parties were then under a mutual *bona fide* mistake. The suit was brought in the court of the Subordinate Judge of Dehra Dun and Mussoorie. One of the pleas raised by the principal defendant, Babu Lal, was that the court had no jurisdiction to try the suit, inasmuch as what was described as the "shop" at Landour was only business located in a house which did not belong to the parties, and consequently there was no immovable property situate within the territorial jurisdiction of the court. The Subordinate Judge was of opinion that he had jurisdiction to try only that part of the suit which related to the said "shop," but that there was no ground for re-opening the partition of 1910 with respect thereto. He, accordingly, dismissed the suit. The plaintiff appealed.

Munshi *Gulzari Lal*, for the appellant :—

The compromise and decree of 1910 effected only a partial partition; the "shop" and business at Landour and a house at Pilkhua were left joint. A subsequent suit for partition lies

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where the former partition was partial. Moreover, the parties to the partition of 1910 had no idea that their cousin Khairati Lal was also entitled to a share, and on that point they were labouring under a *bonâ fide* mistake. One-half of the property having been awarded to Khairati Lal under the decree of 1915, the previous partition was disturbed and the plaintiff was prejudiced in consequence of the common mistake. Under these circumstances the plaintiff is entitled to have the partition re-opened and to have the property remaining after the allotment of Khairati Lal's share re-divided. I rely on *Moyne: Hindu Law*, Eighth edition, page 690, and *Maruti v Rama* (1). The lower court is wrong in holding that it had jurisdiction to entertain only a portion of the claim. It had jurisdiction to try the whole suit, if it had jurisdiction at all, that is, if any portion of the property was situate within its territorial jurisdiction.

Dr. *Surendra Nath Sen*, for the respondent :—

The parties to the present suit were co-defendants in Khairati Lal's suit for partition, and in such suits there can be *res judicata* between co-defendants. Having regard to the nature and character of a partition suit, the present plaintiff might and ought to have pleaded in Khairati Lal's suit that there should be a re-adjustment of the shares between the defendants *inter se*. He cannot be allowed to re-agitate the same matter by a separate suit; *Parsotam Rao Tania v Radha Bai* (2). I am entitled to support the decree of the lower court on this ground, although it was not the ground upon which that court disposed of the case. A partition once effected cannot be re-opened excepting upon some well-defined grounds, which are summarized in *Ramakrishna: Hindu Law*, Volume II, p. 116. The plaintiff has not pleaded either in the plaint or in the grounds of appeal that there was a *bonâ fide* common mistake at the time of the partition of 1910. The lower court has not properly tried the question of jurisdiction. There appears to be no immovable property situate within the jurisdiction of that court. The business at Landour is not immovable property, and the house in which it is located does not belong to the parties. Under section 16 of the Code of Civil Procedure the lower court had no jurisdiction to entertain the suit and it was rightly dismissed.

(1) (1895) I. L. R., 21 Bom. 333.

(2) (1910) I. L. R., 32 All. 469.

Munshi *Gulzari Lal*, was heard in reply.

PIGGOTT, J:—This is an appeal by a plaintiff whose suit for partition has been dismissed by the court of the Subordinate Judge of Dehra Dun and Mussoorie. One of the pleas taken in the written statement was that that court had no jurisdiction to try the suit at all. So far as we can gather from the judgement of the learned Subordinate Judge, he seems to have found that he had no jurisdiction to try the whole suit, but had jurisdiction to try part of it, and he has therefore proceeded to try what he regards as a preliminary question sufficient to determine that portion of the suit which he conceived himself to have jurisdiction to try. The conclusion we have come to is that the court below either had jurisdiction to try the entire suit, or had no jurisdiction to try any part of it. Further, we are of opinion that the decision pronounced with regard to a portion of the plaintiff's claim proceeds upon erroneous principles of law and is calculated to make it impossible for the plaintiff in any event to litigate a possibly just claim any further. We must therefore set aside the decree of the court below and remand the case to that court under the provisions of order XLI, rule 23, of the Code of Civil Procedure. In so doing, however, we must make it quite clear that we do not feel able on the materials before us finally to determine the question of jurisdiction. We leave that question still open, and the court below, after receiving this order of remand, should again take that point into consideration at once and pass appropriate orders, according as to whether it finds that it has or that it has not jurisdiction to try the suit. The said suit arises out of the following state of facts. Ganeshi Lal the plaintiff and Babu Lal the principal defendant are brothers. They were admittedly up to the year 1910 members of a joint undivided Hindu family. In the year 1910 Babu Lal brought a suit for partition against Ganeshi Lal. The specification of the property sought to be partitioned given at the foot of the plaint sets forth a number of houses situated in the town of Pilkhua in the Meerut district, and the suit was accordingly filed in the court of the Munsif of Ghaziabad, within whose territorial jurisdiction the said property was situated. In his defence Ganeshi Lal raised a question as to whether the plaint contained

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a complete specification of the property which ought to be brought under partition. He pleaded that Babu Lal and himself were the joint owners of a shop at Landour, the Cantonment of Mussoorie, that this shop was an ancestral business carried on for the benefit of both parties, that it had not been doing well and that there were heavy liabilities attaching to the business. His written statement implies, if it does not actually state, that this shop or business at Landour was in the possession and under the management of Ganeshi Lal, and it is suggested that Babu Lal's object in suing for the partition of the joint family property at Pilkhua, while omitting all mention of the Landour business, was to saddle his brother Ganeshi Lal with all the liabilities of that business while taking for himself his full half share in the joint property, some of which, it was contended, had been purchased out of the profits of that business at a time when such profits were available. This pleading obviously raises questions of fact and of law which the court conducting the partition would have had to determine before any decree could be passed; but as a matter of fact the case was settled by a compromise between the two brothers. The precise effect of that compromise as regards the business at Landour is a matter of controversy in the present suit; but it is sufficient to note that its result was to partition the immovable property at Pilkhua in a particular manner. One large house was divided between the brothers in equal shares, the eastern portion being assigned to Babu Lal and the western portion to Ganeshi Lal. Certain other houses were assigned, some to one brother and some to the other, and in respect of one house it was provided that it should continue in the joint possession of both parties. A decree was passed on the 21st of December, 1910, in the terms of the compromise. In the year 1914, one Khairati Lal, a cousin of the parties, instituted a suit in which he claimed to recover possession of one-half share of the whole of the property which had been

any share whatever in this property; but the suit was decreed in Khairati Lal's favour on the 3rd of February, 1915. The result of this decree was that the western portion of the largest of the houses in question, that is to say, the portion which had been assigned to Ganeshi Lal at the partition of 1910, was awarded to Khairati Lal; and along with this one smaller building, described as a shop with a *kachcha* house appertaining thereto, and another *kachcha* built house were awarded to Khairati Lal out of the property allotted to Babu Lal in 1910. The plaintiff claims that, in consequence of the success of Khairati Lal's suit, he is entitled to re-open the question of the distribution of the joint family property, and more particularly of the immovable property, effected at the partition of 1910. We must take it that at that time Ganeshi Lal and Babu Lal honestly believed themselves to be the sole owners of the property in their possession which they then partitioned amongst themselves. There was, therefore, a *bond fide* mistake on the part of both parties to the partition, and that mistake has now become apparent and has produced inequitable results because of the success of Khairati Lal's suit. There is good authority for the proposition that under such circumstances the party to the partition who finds himself prejudiced as a consequence of the common mistake is entitled to have the question of the partition re-opened. A very clear case on this point is that of *Maruti v. Ramu* (1). We agree with the principles laid down by the learned Judge who decided that case and we think that they apply to the case now before us. Ganeshi Lal, however, has chosen to complicate the question in two ways. He wishes to re-open, not merely the question of the division effected of the house property at Pilkhua by the partition of 1910, but also the question then raised by him as to the respective rights and liabilities of himself and his brother in connection with the business at Landour. Believing apparently that he could do this more effectually by means of a suit instituted in the court within whose territorial jurisdiction this Cantonment is situated, he has brought the present suit, not in the court of the Munsif of Ghaziabad, but in that of the Subordinate Judge of Dehra Dun and Mussoorie. The question

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(1) (1895) 1, L. R., 21 Bom., 332.

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whether that court has any jurisdiction to entertain this plaint depends simply on whether or not any immovable property sought to be partitioned is situated within the territorial jurisdiction of that court. The provisions of section 16, clause (b), of the Code of Civil Procedure are quite clear in their application to the present case, and, inasmuch as the defendant Babu Lal does not live or carry on business within the jurisdiction of the Subordinate Judge of Dehra Dun and Mussoorie, no possible question arises as to the effect of any subsequent section of the same Code. Either the court below had jurisdiction to entertain the whole of this suit or it had no jurisdiction to entertain it at all, and this depends on what the parties meant in that court when they spoke of the "shop" situated at Landour. The wording of the plaint suggests that they were speaking only of a "business," possibly carried on in a hired shop; but it has been pressed upon us on behalf of the plaintiff that this point is not made clear beyond dispute by the record as it now stands before us and that there is room for further inquiry in the court below. The only other substantial point in the case turns on the wording of the compromise of 1910 and the decree passed in accordance therewith. We are not sure that we have all the materials before us for pronouncing a final opinion on this point, and it is not advisable that we should endeavour to try this question on the merits before the question of jurisdiction has been finally determined. According to the defendant the effect of the compromise decree of 1910 was not merely to assign the business at Landour with its assets and its liabilities, whatever these might be, entirely to the share of Ganeshi Lal; but it did this independently altogether of the partition of the joint property effected by the other portion of the compromise. Virtually the contention for the defendants is that the decision arrived at between the parties on their own compromise in December, 1910, amounted to a decision that this Landour business did not form part of the assets of the joint family but was entirely a matter for which Ganeshi Lal alone was responsible. This is a question which may yet have to be determined between the parties, and it is possible that further evidence may be required before a decision can be pronounced. The point seems worth mentioning in

order to make it clear that, in saying that Ganeshi Lal is in our opinion entitled to have a re-partition of the joint family property made in consequence of the success of Khairati Lal's suit, we are not pronouncing any opinion one way or the other as to whether the assets or the liabilities of the Landour business should or should not be taken into account in connection with such re-partition. Our order therefore is that we remand this case to the court below under order XLI, rule 23, for re-trial subject to the remarks we have made. We leave all costs of this appeal to be costs in the case.

WALSH, J.—I entirely agree. I only wish to add one word on the point arising on the merits which was substantially argued before us. I agree with the decision in I. L. R., 21 Bom, 333, but I think that there is danger in stating as a general principle that proof of such matter entitles the party to re-partition.

I do not think that it entitles him to open up the previous decision except in so far as is necessary to apportion the loss which arises out of the new fact. The right is based simply upon this principle, that where parties arrive at a partition either by agreement, or by a decree (which after all is only a more solemn and binding form of agreement), there is an implied and mutual right of indemnity or contribution in respect of any paramount claim by a third person which throws the burden of a loss not contemplated in the partition proceedings unfairly upon one of the parties. If the original decision has been arrived at by a common mistake, which, of course, in the case of a decree is adopted by the court making the decree, the mistake can be set right *pro tanto*.

Appeal decreed and cause remanded.

REVISIONAL CIVIL

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

MUHAMMAD FARZAND ALI (PLAINTIFF) v. RAHAT ALI AND OTHERS
(DEFENDANTS).*

Civil Procedure Code (1908), order XLIV, rule 1—Application for leave to appeal in forma pauperis.—Application rejected—Further application for leave to pay the full court fee also rejected—Revision.

The rejection of an application made under order XLIV, rule 1, of the Code of Civil Procedure, for leave to appeal as a pauper, is not the rejection of

* Civil Revision No 129 of 1917.

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the appeal. It is, therefore, no ground for rejecting a subsequent application for permission to pay the full court fee on the appeal.

A SUIT was instituted *in forma pauperis*, and a decree was passed therein. The plaintiff applied under order XLIV, rule 1, of the Code of Civil Procedure to be allowed to appeal as a pauper. The application was accompanied by a memorandum of appeal as directed by the rule. The appellate court directed further inquiry to be made by the court of first instance in respect of the applicant's pauperism, and that court reported that the applicant was a pauper. The appellate court then took action under the proviso to rule 1 of order XLIV and rejected the application. On receiving intimation of the rejection the applicant filed a petition praying for permission to pay the requisite court fee on his memorandum of appeal. But the court rejected his petition on the ground that his appeal had already been dismissed. Against this order he applied in revision to the High Court.

Maulvi Iqbal Ahmad, for the applicant :—

What had been rejected was the application for leave to appeal as a pauper. The memorandum of appeal itself had never been dealt with or rejected. The wording of order XLIV, rule 1, clearly shows that the memorandum of appeal is not a part of the application for leave to appeal as a pauper, but that the two things are quite distinct and separate. In rejecting the one the Judge thought that he had rejected the other as well. Under this misapprehension he thought he had no jurisdiction to entertain the petition for permission to pay the court fee on the memorandum of appeal. The court undoubtedly had jurisdiction to allow the applicant to pay the court fee, although the memorandum of appeal was filed without any stamp. The words, "*the whole or any part*," in section 149 of the present Code have made this clear.

Pandit Uma Shankar Bajpai, (for Dr. S. M. Sulaiman), for the opposite party, relied on the cases of *Bishnath Prasad v. Jagannath Prasad* (1) and *MG Wa Tha v. Abdul Gani Osman* (2). He submitted that even if the court fee were allowed to be paid the appeal would be barred by limitation. It was further submitted that the granting or rejection of an application to pay

(1) (1891) 1 L. R., 13 ALL., 305.

(2) (1913) 18 Indian Cases, 518.

in court fees was a matter within the discretion of the lower court, and even an incorrect exercise of that discretion did not furnish a ground for revision.

Maulvi *Iqbal Ahmad*, was not heard in reply.

TUDBALL and MUHAMMAD RAFIQ, JJ. :—The present applicant brought a suit *in formâ pauperis* for possession of certain property which had been mortgaged. He sought to recover possession without payment of any sum of money. On the 15th of July, 1916, the court gave a decree for redemption of the mortgage on payment of Rs. 4,301-3-2. On the 19th of August, he filed an application under order XLIV, rule 1, together with a memorandum of appeal as directed therein asking for permission to be allowed to appeal *in formâ pauperis*. The appellate court directed further inquiry by the court of first instance into the alleged pauperism and, on the 15th of February, that court reported that the applicant was a pauper. On the 17th of February, 1917, the Court then took action under the proviso to rule 1 of order XLIV. It examined the judgement and the decree and rejected the application under that proviso. Information of this was sent to the applicant by post and he received it on the 17th of March, 1917. On the 20th of March, 1917, the applicant filed a petition stating that he had received a post card from the court intimating that his application for permission had been rejected. He therefore prayed that he might be permitted to pay the court fee on his memorandum of appeal. On this the lower court passed the following order :—"Yesterday the applicant filed a petition requesting to be allowed to deposit fees and to prosecute his appeal. His appeal was dismissed on the 17th of February last. I reject his petition." The court therefore refused to exercise its jurisdiction in allowing the court fee to be paid under the impression that the appeal had been dismissed on the 17th of February. This is clearly wrong. The appeal had never been dismissed. The memorandum of appeal is still before the court. On the 17th of February, what was rejected was the application for permission to appeal *in formâ pauperis*. We think that in the circumstances the appellant should have been allowed to pay the court fee, if he so wished, and we allow this application and direct the lower court

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to allow this to be done. Any question of limitation that may arise will be decided by the court in the usual way according to law. The court below will fix a time within which the applicant will pay the court fee. In regard to the costs of this application, they will be costs in the cause and will abide the result.

Application allowed

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MISCELLANEOUS CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.
 BHANA AND ANOTHER (PETITIONERS) v. GUMAN SINGH AND OTHERS
 (OPPOSITE PARTIES) *

Act No XVI of 1908 (Indian Registration Act), section 17—Registration—Agreement by reversioners to forego right to sue for declaration respecting an alienation made by a Hindu widow.

Held that an agreement by which the reversioners to certain property in the possession of a Hindu widow agreed not to enforce their right to sue for a declaration that a gift of such property made by the widow was not binding upon them was not a document which was compulsorily registrable under sect on 17 of the Indian Registration Act, 1908.

THE facts of this case were as follows:—

One Musammat Bhana, a Hindu widow, having a widow's estate, executed a deed of gift in favour of her husband's sister's sons. The plaintiffs were the presumptive reversioners. After the deed of gift had been executed, they were preparing to bring a suit for a declaration that the deed of gift was not binding upon them. The donees and the plaintiffs came to terms. The plaintiffs executed an agreement in favour of the donees under which they agreed not to enforce their right to the declaration which they were about to seek in consideration of the donees transferring to them half of the property and also undertaking to support Musammat Bhana for the rest of her life and to pay off her debts. The donees executed an agreement at the same time under which they agreed that they would transfer half the property to the plaintiffs and would support Musammat Bhana and pay her debts. In spite of this agreement the plaintiffs brought the present suit, in which they asked for a declaration that they were heirs to the

* Civil Miscellaneous No. 421 of 1917.

property and that the deed of gift should be set aside as against them. The court of first instance held that in view of the agreement the plaintiffs' suit was barred, and dismissed it, the defendants being fully willing to carry out their terms of the contract. The plaintiffs appealed. The appellate court held that the agreement ought to have been registered under section 17 of the Registration Act, and that as it had not been registered, it was not admissible in evidence, and, this evidence having vanished, it gave the plaintiffs a declaration that the deed of gift was not binding upon them.

At the instance of the defendants the case was referred to the High Court under rule 17 of the Kumaun Rules of 1894.

Munshi *Lakshmi Narain*, for the petitioners

Munshi *Damodar Das*, for the opposite parties.

TUDBALL and MUHAMMAD RAFIQ, JJ. :—This is a reference under Rule 17 of the Rules and Orders relating to the Kumaun Division of 1894. The facts are simple. Musammat Bhana, a Hindu widow, having a widow's estate, executed a deed of gift in favour of her husband's sister's sons. The plaintiffs are the presumptive reversioners. After the deed of gift had been executed they were preparing to bring a suit for a declaration that the deed of gift was not binding upon them. The donees and the plaintiffs came to terms. The plaintiffs executed an agreement in favour of the donees under which they agreed not to enforce their right to the declaration which they were about to seek in consideration of the donees transferring to them half of the property and also undertaking to support Musammat Bhana for the rest of her life and to pay off her debts. The donees executed an agreement at the same time under which they agreed that they would transfer half the property to the plaintiffs and would support Musammat Bhana and pay her debts. In spite of this agreement the plaintiffs have brought the present suit, in which they ask for a declaration that they are heirs to the property and that the deed of gift should be set aside as against them. The court of first instance held that in view of the agreement the plaintiffs' suit was barred and dismissed it, the defendants being fully willing to carry out their terms of the contract. The plaintiffs appealed. The appellate court held that the

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agreement ought to have been registered under section 17 of the Registration Act, and, as it had not been registered, it was not admissible in evidence, and, this evidence having vanished, it gave the plaintiffs a declaration that the deed of gift was not binding upon them. We are asked our opinion as to whether the decree passed by the Commissioner was correct, and if not, what decree should have been passed in the case. We have examined the agreement. In our opinion it was not compulsorily registrable under section 17 of the Registration Act. It conveyed no right, title or interest, nor did it purport or operate to extinguish any right, title or interest vested or contingent in immovable property of the value of Rs. 100. All that the plaintiffs agreed to do was to forego their right to sue for a declaration for a certain consideration. As reversioners they had no transferable right, title or interest in the property nor did they purport to transfer any such right. They simply agreed not to sue for the declaration for which they have now sought by this suit in court. The document was clearly admissible in evidence. In the circumstances of the case as stated above we think that the plaintiffs' suit was rightly dismissed by the court of first instance. It is nowhere alleged that the defendants have refused to carry out their agreement. In the course of the suit the defendants expressed their willingness to be faithful to their word. There was consideration for the agreement, and we think that the plaintiffs were bound thereby. In our opinion the decree of the appellate court should be set aside and that of the court of first instance should be restored and the defendants should have their costs in all courts including the costs of this reference. The costs in this Court will include Rs. 50 pleader's fees of the defendants.

Appeal decreed.

APPELLATE CIVIL.

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February, 20.*Before M. Justice Piggott and Mr. Justice P. Ish*RAM BARAN RAI AND ANOTHER (PLAINTIFFS) v HAR SEWAK DUBE
AND OTHERS (DEFENDANTS) **Regulation No. XVII of 1806, section 8—Mortgage by way of conditional sale—Suit for redemption—Plea of foreclosure under the Regulation—Procedure.*

In the case of a mortgage to which Regulation No. XVII of 1806 applies, before it can be held that the right of redemption is barred, it must be proved that the requirements of the Regulation have been strictly complied with, that is to say, that the mortgagee had served upon the mortgagor a notice, under the seal and official signature of the District Judge, warning him that the mortgage would be finally foreclosed in the event of his failure to redeem within the period of one year. *Bikal Ram v Taj Ali* (1) followed.

JASAN RAI executed a mortgage by conditional sale on the 27th of December, 1866. His heirs brought a suit for redemption of the mortgage. The main defence was that by virtue of proceedings taken by the mortgagee under section 8 of Regulation XVII of 1806 the mortgage had been foreclosed in 1877, and that the mortgagees were in proprietary possession ever since. The plaintiff stated that an application had been made by the mortgagee for foreclosure, but that he did not obtain any decree for foreclosure. The evidence produced by the defendants of the proceedings under Regulation XVII of 1806 consisted of a copy of the notice or *parwana*, dated the 13th of December, 1876, issued by the District Judge of Gorakhpur to Jasan Rai, and a copy of the final order of foreclosure passed by the said Judge on the 22nd of December, 1877, which recited that an application under section 8 of the Regulation had been made by the mortgagee on the 21st of November, 1876, that a notice had been issued on the 13th of December, 1876, to the mortgagor giving him one year within which to pay up the amount due, that from the Nazir's report it appeared that Jasan Rai was away from home and that the notice and the copy of the application had been served on his son Ram Baran Rai on the 25th of December, 1876,

* Second Appeal, No 1145 of 1916, from a decree of W. R. G. Moir, District Judge of Gorakhpur, dated the 19th of April, 1916, confirming a decree of Muhammad Said-ul-lin, Munsif of Bangaon, dated the 21st of September, 1914.

(1) (1907) 4 A. L. J., 717.

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that proclamation had been duly made, and that the amount due had not been paid or tendered by the mortgagor. The court of first instance held that by reason of these proceedings and the non-payment of the amount due within the year of grace allowed by the notice the right of redemption had been foreclosed, and the mortgagees had become absolute owners. On appeal it was the plaintiff's contention that the proceedings were defective and invalid and were not duly proved as required by law. The lower appellate court held that the admission in the plaint of the fact that the mortgagee had applied under section 8 of the Regulation showed that the mortgagor had had notice thereof, and besides, that the order of the District Judge, dated the 22nd of December, 1877, was sufficient evidence of service of the notice; and that, as the money had not been paid or tendered, the mortgage had been foreclosed and the mortgagees' possession from 1877 was proprietary and adverse. The suit was dismissed accordingly, and hence this second appeal.

Babu *Piari Lal Banerji*, for the appellants :—

Even assuming that all the proceedings, relied upon by the defendants under the Regulation were regular and valid and that they have been properly proved, the title of the mortgagees would not be complete. Those proceedings being of a ministerial nature merely, something else would have to be done to effectively foreclose the mortgage. To do that the mortgagee had to follow up the proceedings with a suit for possession, or, if he was already in possession, with a suit for declaration of his title and possession as full owner. I rely on the observations at bottom of page 350 and top of page 351 of the report of *Forbes v. Ameeroonissa Begum* (1). No such suit was brought by the mortgagees in the present case. Further, the proceedings themselves were defective and invalid. It is for the mortgagee to show that he strictly complied with all the conditions and procedure prescribed by the Regulation. Non-compliance in any one respect would make the foreclosure ineffective and would not extinguish the equity of redemption. The provisions of section 8 of the Regulation are imperative; *Madhopersad v. Gajudhar* (2). The period of one year allowed by section 8 of the Regulation should

(1) (1885) 10 Moo. I. A., 340.

(2) (1894) I. L. R., 11 Cal., 111.

be calculated from the date of service of the notice upon the mortgagor ; *Mahesh Chandra Sen v. Tarini* (1), *Norender Narain Singh v. Dwarka Lal Mundur* (2). Here, assuming that the proper service of the notice has been duly proved, the date of service was the 25th of December, 1876, and the date of the final order was the 22nd of December, 1877 ; so that the order was passed before the expiry of one year. Moreover, the notice had to state from what date the year would begin to run and this was not done in the present case ; *Madhopersad v. Gajudhar* (3).

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Service of the notice has not been duly proved ; it has to be established by evidence. The mere recital in the Judge's order, or the endorsement of the Nazir on the back of the notice, that the mortgagor had been duly served is not legal proof and not even *prima facie* evidence of due service ; *Norender Narain Singh v. Dwarka Lal Mundur* (2). Besides, on the defendant's own showing, the notice was not served on the mortgagor Jasan Rai but on his son. The use made by the lower appellate court of the pleadings in the plaint was not at all justified. There was no admission at all of due service of the notice or of compliance with any of the formalities prescribed by the Regulation. In this connection there are some important observations at pages 406, 407 of the case in I. L. R., 3 Calc., 397, and at page 118 of the case in I. L. R., 11 Calc., 111. The defendants have not proved that before commencing the proceedings under the Regulation they made a previous demand of payment : the omission to make such demand vitiates the proceedings altogether ; *Karan Singh v. Mohan Lal* (4). A recital in the application for foreclosure itself of a previous demand having been made is no proof thereof ; *Sitla Bakhsh v. Lalta Prasad* (5). The case of *Badal Ram v. Taj Ali* (6) was a case of a suit for redemption like the present, and fully supports me. No question of adverse possession arises in this case. The foreclosure proceedings being invalid, the right of redemption was not extinguished thereby, and the mortgage subsists. Mere assertion of an adverse title will not enable a mortgagee in possession to convert his possession as mortgagee

(1) (1868) 1 B. L. R., (F. B. rulings), 14.

(2) (1877) I. L. R., 3 Calc., 397.

(3) (1884) I. L. R., 11 Calc., 111.

(4) (1882) I. L. R., 5 All., 9.

(5) (1886) I. L. R., 3 All., 388.

(6) (1907) 4 A. L. J., 717.

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into adverse possession as owner, or, in other words, to cut down the period of redemption from 60 years to 12 years; *Sheopal v Khadim Hossein* (1), *Ali Muhammad v Lalta Balhsh* (2).

Pandit *Lakshmi Narayan Tewari* (with Munshi *Haribans Sahar*), for the respondents :—

It has been contended by the appellant that, inasmuch as the mortgagee did not follow up the proceedings under the Regulation with a suit to establish his title, the foreclosure failed to be effective. Reliance was placed for this proposition upon certain passages in the judgement of the case reported in 10 Moo. I. A., 340, but there are other passages at pp. 350 and 351 which lay down that where proceedings are taken under section 8 of the Regulation the only issue, in so far as the right of redemption is concerned, thereafter left to be considered, is whether the payment or deposit had or had not been made before the expiry of the year of grace. In the present case admittedly there was no such payment or deposit. It has been held in later cases, after consideration of the passages mentioned above, that the mortgagee's title became absolute as soon as the year of grace expired without payment having been made, and that it was not necessary for the mortgagee to institute a suit thereafter for perfecting his title; *Ali Abbas v. Kalka Prasad* (3) *Batul Begam v. Mansur Ali Khan* (4).

The right of redemption was extinguished by the expiry of the year of grace, *ipso facto*; the final order was not a necessary ingredient. Even without the final order, and the recording of a final order is not a requirement prescribed by section 8 of the Regulation, the equity of redemption would be extinguished by lapse of the year without the deposit. Any real or alleged irregularities in the final order are, therefore, immaterial, and cannot be made the basis of any valid arguments against the respondents.

Regarding most of the cases cited by the appellants a distinction is to be drawn between two classes of suits which may follow proceedings taken under the Regulation; the first being suits instituted by the mortgagee with the object of getting a pronouncement from the court of the completeness of his title, and the

(1) N.W.P. H. C. Rep., 1875, 220.

(2) (1878) I. L. R., 1 All., 455.

(3) (1892) I. L. R., 14 All., 405.

(4) (1901) I. L. R., 24 All., 17.

second being suits brought by the mortgagor for redemption. The questions that arise for determination in the two classes of suits are different, and the *onus* of proof is on a different party. In a suit for redemption brought after the close of proceedings under the Regulation the only question for determination is whether or not the deposit was duly made. This was clearly pointed out in the case in 10 Moo. I A., 340. It was with reference to a suit by a mortgagee to recover possession that it was laid down in the case in I L R, 3 Calc, 397, that it was essential to prove strict compliance with the conditions laid down by the Regulation, *vide* top of p. 405, "in an action of this kind *etc.*" In a suit for redemption brought many years after the completion of the proceedings under section 8 it would be very hard on the mortgagee to throw upon him the burden of proving everything. That was never intended by the Privy Council. With the exception of the case in 4 A L J., 717, all the other cases cited by the appellants related to suits brought by a mortgagee to enforce foreclosure; they are, therefore, distinguishable. The case of *Badul Ram v. Taj Ali* (1) has extended to suits for redemption the rule that was laid down by the Privy Council with special reference to suits for enforcement of foreclosure brought by a mortgagee. It is submitted that there is no warrant for this extension. On the other hand, such extension would appear to be contrary to the intention of the Privy Council. As regards the question of proof of service of the notice, the lower appellate court has found that it has been proved. In second appeal that finding cannot be challenged on the ground of insufficiency of evidence. Further, the dictum against the propriety of presuming in favour of the due performance of all the requirements of section 8 of the Regulation was laid down with reference to suits by mortgagees and is not applicable to the present case. Personal service on the mortgagor himself was not indispensable; *Field*: Regulations of the Bengal Code, p. 377, *Madho Singh v. Mahtab Singh* (2). If it be held that the *onus* of proof in the present case lay on the mortgagees, the case may be remanded for a finding as to previous demand, service of notice, *etc.*, as was done in the case in I. L. R., 5 All., 9.

(1) (1907) 4 A. L. J., 717. (2) N. W. P., H. C. Rep., 1871, p. 325.

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Babu *Piari Lal Banerji*, was not heard in reply.

PIGGOTT and WALSH, JJ.:—This was a suit in which the plaintiffs claimed redemption of a mortgage by conditional sale effected on the 27th of December, 1866. The plaintiffs are the son and grandson of the original mortgagor, and the defendants are the sons and grandsons of the original mortgagee. The fact of the mortgage is admitted, and we find that it was never pleaded that the said mortgage, if redeemable at all, was redeemable only for a larger sum than that tendered by the plaintiffs. The defendants, however, contended that the equity of redemption had been extinguished by reason of certain proceedings taken in the year 1876 by the mortgagee under section 8 of Regulation XVII of 1806. Both the courts below have found in favour of the defendants on this point and have added a finding that the present suit is barred by limitation. This latter finding, as it stands, is difficult to accept. The suit was one for redemption and was brought within the statutory period of limitation. Either the equity of redemption has been extinguished, or it has not. Of course, if it has been extinguished, the suit fails, not by reason of any bar of limitation, but because the plaintiffs have failed to prove their cause of action, namely, a subsisting right to redeem. If on the other hand, the equity of redemption has not been extinguished, the suit is obviously within time. The essential question for determination is whether the proceedings taken by the mortgagee in the year 1876 had the effect of extinguishing the equity of redemption. This must depend in the first instance upon whether the mortgagee caused the mortgagor, or his legal representative, to be served with a copy of his own written application for foreclosure and also with a notice or *parwana* under the seal and official signature of the District Judge, warning him that the mortgage would be finally foreclosed in the event of his failing to redeem within a period of one year. The evidence by which it is sought to prove these facts consists of certain records of the proceedings of the court of the District Judge of Gorakhpur. There is abundant authority to support the proposition that such records cannot be accepted as *prima facie* proof of the fact of service. It has been contended before us on behalf of the respondents that most of the decisions on the point were pronounced in

cases in which the mortgagee had come into court asking for a decree for possession, or a decree declaring his proprietary title, after he had taken the requisite proceedings under Regulation XVII of 1806. There is, however, a Bench decision of this Court in which the same principles have been applied to a suit for redemption exactly on all fours with the suit now before us. We refer to the case of *Badal Ram v. Taj Ali* (1). We have been asked to consider the decision in that case; but we do not ourselves see any adequate reason to dissent from it, and in any case we prefer to follow it on the principle of *stare decisis*. The evidence relied upon by the learned District Judge as proving that the equity of redemption was extinguished by reason of the proceedings taken in 1876 was not evidence which could be accepted as establishing the facts sought to be proved on behalf of the defendants, and the decision of the District Judge on this point is based upon an erroneous view of the law and is open to interference by this Court under section 100 of the Code of Civil Procedure. We may note that the Bench case to which reference has already been made was also decided in second appeal. These considerations are sufficient to dispose of the present appeal. We set aside the decrees of both the courts below, and in lieu thereof we give the plaintiffs a decree for redemption, to be drawn up in the form prescribed by order XXXIV, rule 7, of the Code of Civil Procedure, allowing redemption of the property in suit on payment of the sum of Rs. 393-1-0 (rupees three hundred and ninety-three and anna one only) on account of principal and interest, within three months from this date. The plaintiffs will be entitled to their costs in all three courts.

Appeal decreed.

APPELLATE CRIMINAL.

Before Justice Sir George Knox and Mr. Justice Walsh.
EMPEROR v. MAHA RAM AND OTHERS.*

Act No. XV of 1872, (*Indian Christian Marriage Act*), sections 3 and 68.—“Persons professing the Christian religion”—*Marriage between two bhungs celebrated according to caste rites by two “Christians”*

One Maha Ram, whose father was a Christian, but who himself was found not to be a Christian within the meaning of section 3 of the Indian Christian

* Criminal Appeal No. 873 of 1917, from an order of B. B. P. Rose, Additional Sessions Judge of Mainpuri, dated the 17th of September, 1917

(1) (1907) 4 A. L. J., 717.

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Marriage Act, 1872, although he had been baptized when an infant and used to attend a Christian school, was married to a *bhang*i girl according to the rites of the *bhang*i caste. This marriage was conducted by two persons, Bachchan and Mangli, who, although they were apparently Christians within the meaning of the Act, officiated as "*mans*", or priests, of the *bhang*i caste. All these persons were convicted, - Bachchan and Mangli of the substantive offence defined in section 68 of the Indian Christian Marriage Act, 1872, and Maha Ram of abetment of that offence.

Held that the convictions could not stand, both because Maha Ram, on the facts appearing in evidence, could not be held to be a Christian within the meaning of section 3 of the Indian Christian Marriage Act, 1872, and also, as *held* by WALSH, J, because the Act in question deals with Christian marriages and Christian marriages only. *Queen-Empress v. Paul* (1), *In re Kolandavelu* (2) and *Mukhusami Mudaliar v. Masilamani* (3) discussed by WALSH, J.

THE facts of the case were briefly as follows :—

One Maha Ram, alleged by the prosecution to be a Christian, was married to the daughter of one Shib Lal a *bhang*i (sweeper) according to the rites of the *bhang*i caste. At this marriage Bachchan and Mangli, who were also alleged to be professing Christianity, acted as *mans* (or priests).

Bachchan and Mangli were charged and convicted under section 68 of the Indian Christian Marriage Act (Act XV of 1872, as amended by Act XII of 1891) of the offence of solemnizing, in the absence of a Marriage Registrar of the district, the marriage of Maha Ram, a Christian, with a female sweeper according to *bhang*i rites. Maha Ram accused was convicted of the abetment of the aforesaid offence. The assessors gave it as their opinion that Maha Ram was not a Christian and therefore no offence under section 68 of Act XV of 1872 had been committed. The learned Sessions Judge was of a different opinion. He found the accused persons guilty and sentenced them each to undergo rigorous imprisonment for a term of one year. All three accused appealed to the High Court.

Mr. *Nihal Chand* with him (*Munshi Baleshwari Prasad*), for the appellant :—

Act No. XV of 1872 is an Act to consolidate and amend the law relating to the solemnization in India of the marriages of persons professing the Christian religion. This Act is based on 14 and 15 Vic., Ch. 40; and 58 Geo. III, Ch. 84 (both Statutes

(1) 1890 I. L. R., 20 Mad., 12.

(2) (1916) I. L. R., 40 Mad., 100.

(3) (1910) I. L. R., 38 Mad., 342.

relating to marriages in India, but now no longer in force) and Act V of 1852 and V of 1865, which last two Acts were repealed by this Act.

For the scope of the Act, the *Gazette of India*, 1872, Supp., p. 805, was referred to:—"There was little doubt that the intention of the Bill, as introduced, was simply to deal with the forms and ceremonies of marriage; it was to be what it called itself—A Bill to regulate the law for the *solemnization of marriage*, not a Bill to regulate the *Marriage Law*." The history of the Legislation thus clearly shows that doubts had arisen as to the validity of certain marriages and it was clearly intended to facilitate such marriages and validate them. The object of the Act was not to prevent people marrying as they wished but to provide certain forms and ceremonies if they wanted to be married as Christians and at the same time to guard them by providing strict penalties for non-compliance with those ceremonies. The whole Act shows that it deals with Christian marriages alone. If they are not solemnized by one of the persons mentioned in section 5, they are made void by section 4. It is submitted that the Act does not prohibit even a Christian from marrying otherwise than under the Act, if he wishes to do so. The offence charged here is that the accused "solemnized" a marriage in the absence of the Marriage Registrar. Now it is not suggested that the Marriage Registrar is authorized to attend Hindu marriages, and it is to be noted that no person other than a Christian can be appointed a Marriage Registrar (*Vide* section 7). If, therefore, a Hindu does marry a Christian girl according to the custom of the caste both he and the officiating priest render themselves liable to imprisonment or transportation for ten years. Again a *Sunni* Musalman can validly marry a *kitabia* (*i. e.*, a Jew or a Christian), according to his law in the permanent form and with Muhammadan rites. If section 68 of the Christian Marriage Act be interpreted as widely as has been done by the Madras High Court, a *Kazi* who performs a marriage between a Musalman male and a Christian female according to Musalman rites is liable to the punishment of transportation for ten years, whereas a Christian Minister or Marriage Registrar who performs a marriage with Christian rites between a Musalman male

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and a Christian female is not subjected to any such penalty and performs a perfectly valid act. The Act cannot be said to violate the principle of religious neutrality followed almost without exception by the Indian Legislature. A construction, which credits the Legislature with such violation should, if possible, be avoided. The Madras High Court has consistently held against me; *Queen-Empress v. Fischer* (1), *Queen-Empress v. Yohan* (2), *Queen-Empress v. Paul* (3) and *In re Kolandaivelu* (4).

In the last mentioned case the order referring the case to the Full Bench supports the appellant's contention, and is adopted as part of the argument for the appellant. It is submitted that section 68 provides penalties for a person, who not being authorized by section 5 of the Act to solemnize marriages, solemnizes or professes to solemnize in the absence of a Marriage Registrar, a marriage (purporting to be a Christian marriage under the Act) between persons one or both of whom is or are a Christian or Christians.

The next question is whether Maha Ram was a Christian at the time of his marriage. Under section 3 of the Act the expression "Christian" means persons professing the Christian religion. As regards the meaning of the word "profession" *Murray's Oxford Dictionary*, Vol. VII, was referred to, the expression being explained in these words:—"To affirm or declare one's faith in or an allegiance to; to acknowledge or formally recognize as an object of faith or belief (a religion, principles, rule of action, God, Christ, a saint, etc.)" After discussing the evidence it was contended that merely because a person had been baptized when three years old, or that he had attended a Christian school would not make him a person professing the Christian religion. In the case of Maha Ram there was no evidence if at any time he acknowledged or formally recognized Christianity as his religion. On the contrary, on the eve of his marriage, he resisted all pressure and persuasion to be married as a Christian by a Christian ceremony, and he actually performed "*Devi ka Puja*", at the time of his marriage.

(1) (1891) I. L. R., 14 Mad., 342.

(2) (1892) I. L. R., 17 Mad., 391.

(3) (1896) I. L. R., 20 Mad., 12.

(4) (1916) I. L. R., 40 Mad., 1030.

Mr. R. K. Sorabji (with the Government Advocate, Mr. A. E. Ryves), for the Crown :—

The intention of the Legislature was clear. Section 4 expressly says that "any marriage between persons, one or both of whom is or are a Christian or Christians shall be solemnized in accordance with the provisions of the next following section, and any such marriage solemnized otherwise than in accordance with such provisions shall be void," and section 68 merely provides a penalty for solemnizing or professing to solemnize such a marriage contrary to the provisions of the Act. The intention of the Legislature was that the country should not be flooded with void marriages with all the incidental evils as to illegitimate children and questions of property and inheritance. This result would be equally produced by a state of concubinage; the interpretation sought to be put on the section on behalf of the accused would tend to encourage concubinage. Upon the evidence as regards Maha Ram's profession of Christianity great stress was laid on the fact that Maha Ram accused who took all the advantages supplied by a Christian school was estopped by his conduct from asserting that he was not a Christian.

KNOX, J.—Maha Ram who described himself as son of Kallu by caste a sweeper, Mangli, son of Sundar, sweeper, and Bachhan, son of Laiq, sweeper, have been convicted of an offence under section 68 of Act No. XV of 1872. In the case of Maha Ram section 109 of the Indian Penal Code is to be read with section 68 of Act No. XV of 1872.

The case for the prosecution is that Maha Ram is a Christian; that on the 3rd of June, 1917, he was married to the daughter of one Shib Lal *bhanghi*, and that Bachhan and Mangli were *mans*, or so-called priests of the sweeper class, who solemnized the marriage according to *bhanghi* rites. The assessors gave it as their opinion that Maha Ram was not a Christian and that therefore no offence under section 68 of Act No. XV of 1872 had been committed. The learned Sessions Judge, however, was of a different opinion. He found the accused persons guilty and sentenced them each to undergo rigorous imprisonment for a term of one year. The appellants have been represented in this

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Court by learned counsel. The contention on behalf of the appellants is that section 68 of the Christian Marriage Act does not apply; that Maha Ram was not a Christian at the time of his marriage; and that it is not proved that Bachhan and Mangli solemnized the marriage. The first point, therefore, that arises for consideration is whether Maha Ram was at the time of the marriage a Christian.

Act No XV of 1872, and specially the section concerned, which is a section imposing what may amount to a very severe punishment, has, under the well-known rules for construction in such cases, to be so construed that no cases be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. No violence must be done to its language in order to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language: *The London County Council v. Aylesbury Dairy Company* (1). As ABBOTT, C. J., pointed out in *Proctor v. Munwaring* (2), it is not competent to a court to extend the words by construction.

Now Act No. XV of 1872 was an Act to consolidate and amend the law relating to the solemnization in India of the marriages of Christians. This was the legislative intent, and it will have to be seen that the interpretation placed upon the words in this section is one which harmonizes with the context and promotes in the fullest manner the policy and object of the Legislature.

The term "Christian" is interpreted in section 3 of the Act and runs as follows:—"The expression *Christian* means—persons professing the Christian religion." The use of the word "means" in this passage shows that the definition is a hard and fast definition and that no other meaning can be assigned to the expression than is put down in the definition: *Gough v. Gough* (3) and *Bristol Tram Coy. v. Mayor &c. of Bristol* (4).

In several sections of the Act, as for instance, sections 23, 37 *etc.* another term is used, namely, "*Native Christian*." Also here is a part of the Act which is entitled "Marriage of Native Christians" and which extends from section 60 to section 65 of Act No. XV of 1872.

(1) (1898) 1 Q. B., 106.

(2) (1819) 5 Barn and Ald., 145.

(3) (1891) 2 Q. B., 655.

(4) (1890) 59 L. J., Q. B., 441.

Section 3 interprets the expression "Native Christian." The meaning given to this latter expression is different from the meaning given by the Act to the expression "Christian." It includes the Christian descendants of natives of India converted to Christianity as well as such converts. If the Legislature had contemplated applying section 68 to a Christian, i.e., a person professing the Christian religion, and had wished to comprehend within it a Christian descendant of a native of India, it would have been easy to provide for this in section 68. That no such provision was made confines section 68 strictly to persons who at the time of marriage were persons professing the Christian religion. It is important to notice this, as occasionally in the argument on behalf of the prosecution attempt was made to contend that section 68 applied not only to a Christian but also to a Native Christian. I am unable to accept this contention, and I hold that the issue which I have to decide is whether Maha Ram at the time when he was married to the daughter of Shib Lal was or was not a person professing the Christian religion. Again I repeat the word "means" which is to be found in section 3 is an inclusive term and therefore no one except a person who professes the Christian religion comes within the purview of section 68.

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This drives me back upon the necessity of deciding who is a person who professes the Christian religion.

I have not been referred to nor have I been able to find any precedent which lays down clearly what meaning is to be attached to the words "profession of Christianity."

Murray in the Oxford Dictionary, (Volume VII, 1909), interprets the word "profess" thus:—"To affirm or declare one's faith in or an allegiance to; to acknowledge or formally recognize as an object of faith or belief (a religion, principle, rule of action, God, Christ, a saint, etc.)"

In the case before us we have not to deal with a person of an immature age or one who for any reason is unable to give a reasonable account of the faith that he holds, e.g., an orphan of tender years in a school, etc. For several years Maha Ram has been a grown up lad mixing in village and school life. There must have been many opportunities for observing and noting

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what he acknowledged or formally recognized as an object of faith or belief, and I should expect to have been referred to abundant evidence on this point. He is the son of one Kallu. Regarding Kallu the evidence is that he was elected to the position of elder in the Presbyterian Church; that he was ordained by the Presbytery; that he can under certain circumstances administer sacraments; that he is a moderator every year; that he has been confirmed, that he sits upon session as *sirpanch* of a local Church; that he was an officiating elder up to and after the marriage of Maha Ram; that he was an outspoken preacher; that he prayed and preached Christianity; that he taught Christianity in his own village and in adjoining villages; that on one occasion when a *thanadar* said he would not believe Kallu to be a Christian unless he prayed, Kallu offered up prayers in public. All this is strong *prima facie* evidence of his having been a person who professed the Christian religion.

The same might be said of the evidence given regarding Bachhan and Mangli. It does not go into as many details, but it gives specific instances where these men "professed" the Christian religion. I have searched in vain for similar definite and specific information in the case of Maha Ram. There is evidence which points the other way for whatever it is worth. It seems to me of very little value and so I do not go into it.

The evidence upon this point given by the Crown consists of the evidence of—

- (1) The Rev. A. W. Moore, a minister of the Presbyterian Church and a Missionary in charge of the Mission at Mainpuri;
- (2) Isa Das, the own brother of Maha Ram;
- (3) Sundar, who says that he became a Christian some five years ago;
- (4) Behari;
- (5) The Rev. W. T. Mitchell, Missionary at Mainpuri;
- (6) Madan Lal, a petition-writer.

The evidence of the Rev. A. W. Moore is to the effect that Maha Ram is a Christian and that Bachhan and Mangli are also Christians. When cross-examined as to the meaning of this word Mr. Moore says:—"We call a man Christian though not confirmed or professing the Christian religion," further on, while saying that Bachhan and Mangli had both to his knowledge professed

Christianity, he does not make the same statement regarding Maha Ram. All that he says about Maha Ram is that his name was entered in the Baptismal Register, which sacrament was apparently administered at the time when Maha Ram was a babe 3 years old; that he never up to the time of his marriage told the witness that he was not a Christian, and that though he has seen him since his marriage he has not denied that he is a Christian. When the witness on one occasion said to him that judging by the clothes he wore no one would take him for a Hindu he laughed and said "no." The witness got Maha Ram entered in the Industrial School at Farrukhabad to learn carpentry. He was at the school up to within 2 or 3 days of the wedding. The school is for Christian boys only and witness sent him there as a Christian. This is all upon the point. It does not appear then from the evidence of this witness that Maha Ram ever took part in Church ceremonies such as prayers and the like.

The next evidence in point of importance is that of Rev W. T. Mitchell. He baptized Maha Ram when he was 3 years old. In his examination-in-chief this witness says that Maha Ram, when he was in the school at Mainpuri, professed to be a Christian; that he took part in Church ritual a little before March, 1915, but the witness does not specify what part or what particular ritual. In cross-examination this witness says that while all the brothers and sisters of Maha Ram had been baptized, they have, with the exception of one brother the witness Isa Das, been married according to *bhangî* rites. They have not strictly adhered to the tenets of Christianity.

Isa Das, the brother of Maha Ram, gave it as his deposition that Maha Ram is a Christian. He never knew that Maha Ram had renounced Christianity. In cross-examination he had to admit that he lived apart from Maha Ram and that one of his sisters was married according to *bhangî* rites.

The rest of the evidence for the Crown is of little importance. It is, however, abundantly apparent from it that Maha Ram had given it out that he intended to have his marriage solemnized according to *bhangî* rites. Much attempt was made to dissuade him and his father from doing this, but the persuasions were in vain, and it appears from the evidence of Mr. Moore that in a

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marriage solemnized according to *bhangī* rites idolatry takes place and *Devi ka puja* or the worship of the goddess *Devi* is gone through

In brief, then, it would appear from the above evidence that no distinct "profession" of the Christian religion is attributed to Maha Ram beyond the fact that he dressed as a Christian, that when he was at the school at Fatehgarh he wrote one or more letters in which he called himself *Mahbub Masih*. He had never been admitted to sacrament, and, according to the witness Moore, such admission depends upon a confession of faith. This Maha Ram has never been shown to have made. His brothers and sisters, with the exception of Isa Das, are all persons who have been married with *bhangī* rites and at such a marriage an open profession of idolatry is made before witnesses.

I am not prepared to hold that a person is a person professing the Christian religion within the meaning of Act No. XV of 1872 simply because he is baptized as an infant when he has no possibility of saying to the world what is the faith to which he belongs, nor do I attach any particular value to the fact that he attends a Christian school. The learned counsel for the Crown wished me to hold that a person who took the advantage supplied by a Christian school was stopped by his conduct from professing that he was not a Christian. The dressing as a Christian seems also to me very far from being conclusive on this point, especially in the case of persons who belong to the *bhangī* class. The furthest point urged in this direction by the prosecution is perhaps the writing of letters under the title of Mahbub Masih; but no letter was produced nor was it shown that letters so written were at all of a public nature. On the other hand, we have undoubtedly a profession in the case of his performing *Devi ka puja* at the time of his marriage. That act was undoubtedly a profession, an act entirely inconsistent with, I might add repugnant to, the view that the person performing it was a person professing the Christian religion. I am not satisfied therefore that at the time when this marriage was solemnized Maha Ram was a Christian.

Holding as I do that Maha Ram was not a Christian at the

was committed on the 3rd of June, 1917, either by the so-called principals Mangli and Bachhan or by the abettor Maha Ram.

I do not consider it necessary to go into the question whether section 68 of Act No. XV of 1872 was intended to penalize marriages other than those intended to be or purporting to be marriages under the Indian Christian Marriage Act, 1872. It seems extremely doubtful whether it was so, but, as I have said before, the question does not arise for decision in this case.

WALSH, J.—I entirely agree. I should hold, apart altogether from the general history of Maha Ram, to which my brother has referred, that when a person on the eve of his marriage resists all pressure and persuasion to be married as a Christian by a Christian ceremony, and, having by birth and connection other religious associations, deliberately decides to marry a sweeper, according to sweeper rites, and does public worship to Hindu gods in the presence of his relations and friends, he is not “a person professing the Christian religion.”

Mr. Sorabji contended that Maha Ram was “estopped” from denying his Christianity. Apart from the fact that the principle of estoppel has no place in the criminal law, the idea of a “Christian by estoppel” is a contradiction in terms.

The wider question, as to the real ambit of section 68 of the Indian Christian Marriage Act of 1872, is really involved in what we have decided and I propose to state my views about it for the following reasons. The case for the prosecution was argued mainly upon that ground; the learned Sessions Judge who decided this case obviously did not like it, but felt himself bound to follow the decision in 40 Madras; there has already been a division of judicial opinion on the subject; the question is one of public importance; I entertain no doubt upon it, and I think that prosecutions like the present should be discouraged.

It is important to consider the scope and object of the legislation. It is a consolidating and amending Act, replacing the English Acts of 1818 and 1851, relating to marriage in India, and the Indian Acts of 1852, 1865 and 1866, dealing with the same subject. These were enabling statutes providing special conditions appropriate to the special circumstances and difficulties which are likely from time to time to confront those in India who wish to be married by Christian marriage. The history of the legislation shows that doubts had arisen as to the validity

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of certain marriages, and it was clearly intended to facilitate such marriages and to validate them and at the same time to guard them by strict requirements. The legislation is not unlike the Foreign Marriages Act in England. The object of the Act is not to prevent people marrying as they wish, but to enable them to protect themselves and their posterity by a lawful and binding marriage if they wish to be married as Christians. The Act is to be called the Indian Christian Marriage Act, and in my opinion it deals with Christian marriages, and Christian marriages alone. In future such marriages can only be lawfully effected under this Act. If they are not solemnized by one of the persons described in section 5, they are made void by section 4. The Act does not prohibit even a professing Christian from marrying otherwise than under the Act if he wishes to do so.

We therefore start with this that there is no express prohibition preventing a professing Christian from doing violence to his faith and marrying a non-Christian by a non-Christian ceremony. His marriage may not be valid by English Law as a Christian marriage in India, but it is not forbidden to him. It would be a startling result of this Act, if such a person being free to choose, and not prohibited from marrying otherwise than by a Christian marriage, should find himself liable to transportation for abetting the person who marries him.

An analysis of Part VII of the Act, which deals with penalties, shows that such penalties are in the main directed against the offence of either one party or the other, or the officiating celebrant, or the official who may lawfully authorize the celebrant, wilfully and falsely doing some act in pretended pursuance of the Statute which probably would, and certainly might, render the whole proceeding invalid. Omitting section 68 for the moment, every other offence dealt with is an act done which the Act requires to be done, and which is done either by a person lawfully authorized but by unlawful means, or by lawful means by an unauthorized person.

Turning to section 68, it is to be noted that the section does not make it criminal for a professing Christian to marry by a ceremony which is void under section 4. It is confined solely to the persons who solemnize the marriage, and the Act makes it criminal for a person to solemnize a marriage who is not

authorized by section 5 to do so. But section 5 only authorizes a person to solemnize Christian marriages, and no body can solemnize Christian marriages in India who is not authorized by that section. Section 5 itself appears to employ the word "marriages" in the widest possible sense. "Marriages," it enacts, "may be solemnized in India," by certain specified persons. But this does not mean that no other marriages may be solemnized in India. That would be an impossible contention. It must, therefore, mean "marriages under this Act," or in other words "Christian marriages." I read section 68, therefore, as referring to a class of persons, namely, those who solemnize, or profess to solemnize a Christian marriage under this Act, not being authorized by section 5 to do so. I cannot believe that the Legislature could have intended to sweep into the net of the criminal law, through an indirect piece of legislation by reference, not only every professing Christian who chooses not to be married as a Christian, but every non-Christian whom such persons might marry, and every non-Christian who took part in the solemnization or celebration. This would be contrary to the ordinary mode of interpretation of a statute, and would produce far reaching and almost ludicrous results. I do not think the question turns upon the word "solemnize" so much as upon the object and scope of the Act. The case of *Queen Empress v Paul* (1), decided in 1894, turned on the word "solemnize." The Sessions Judge had acquitted on the ground that the part taken by the Hindu priest did not amount to solemnization. He seems to me to have been feeling for a way of evading the construction of the Act now contended for and to have seized on the word "solemnization." The appellate court disagreed, but I think their minds were diverted from the real difficulty. They went on to hold that the contracting parties themselves ought to have been convicted of abetment. As I have said, this is a startling result, and satisfies me that there must be a fallacy in the reasoning which reaches it. I have carefully considered the recent case *In re Kolanaiavelu* (2), decided by the Chief Justice and two Judges on a reference by Napier, J. I cannot agree with it. I see no answer to the reasoning in Napier, J.'s referring order, while the Chief Justice slips into an apparent error. "Section 68," he (1), (1890) I. L. R., 20 Mad., 12. (2) (1916) I. L. R., 40 Mad., 1080.

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says, "merely provides a penalty for solemnizing or professing to solemnize such a marriage contrary to the provisions of the Act." This is not so. It imposes a penalty upon any person who does under section 5 what he is not authorized to do, namely solemnizes a Christian marriage.

Mr. *Sorabji* urged that the intention of the Legislature was clear. They did not want the country flooded with void marriages with all the incidental evils as to illegitimate children and questions of property and inheritance. This result would be equally produced by a state of concubinage not regularized by any form of marriage, and the interpretation contended for might be said rather to encourage concubinage. On the other hand, as was pointed out by the Government Advocate, who appeared at our request so that the view of Government might be presented to us, the Madras High Court in 1910 held that such a marriage as the present may be valid by Hindu law if a custom is established governing such marriages. See *Muthusami Mudaliar v. Masilamani* (1). In that case the bride was a Roman Catholic. She removed the cross from her neck, and her forehead was smeared with holy ashes by a Brahman priest. The trial court spoke of "the prevalence of the practice of Hindus marrying Christian girls according to Hindu rites and such girls after their marriage following the Hindu religion." The validity of the marriage was upheld by the Madras High Court. This seems to me an additional ground for differing from the decision of the so-called Madras Full Bench in 40 Madras. The result seems that, at present according to the law in Madras, a valid Hindu marriage may be a criminal offence, both on the part of the principals and on the part of those who celebrate it. I cannot accept this consequence, which illustrates very forcibly the importance of holding to the principle which my brother Knox has reiterated, of not straining a criminal enactment beyond what is included in its express terms.

BY THE COURT.—We allow this appeal. We find Mangli and Bachhan not guilty of the offence charged, i.e. an offence under section 68 of Act No. XV of 1872, and Maha Ram not guilty of abetment of the aforesaid act and direct that they be released. We understand they were permitted to give bail; if they did give bail, the bonds will be discharged.

Appeal allowed—Conviction quashed.
(1) (1910) I. L. R., 33 Mad., 342.

PRIVY COUNCIL.

HET RAM (DEFENDANT) v. SHADI RAM (PLAINTIFF) AND OTHERS (DEFENDANTS)

[On appeal from the High Court of Judicature at Allahabad]

Mortgage—Prior mortgagee who had obtained a decree absolute for sale but had not executed it—Decree barred under schedule II, article 179, of Limitation Act, 1877—Subsequent mortgagee not made a party to suit under section 85 of Transfer of Property Act, 1882—Registered later mortgage as notice to prior mortgagee—Suit to enforce later mortgage—Prior mortgagee's right merged in decree and extinguished—Transfer of Property Act, section 89, construction of.

The question in this appeal was whether property mortgaged to the respondent on the 15th of October, 1881, should, when sold under a decree absolute for sale, be treated as sold subject to an alleged prior right of the appellant under an earlier mortgage of the same property, dated the 25th of February, 1880.

The appellant, in 1883, acquired the title of the mortgagor, and also such title as remained to the mortgagee, under the earlier mortgage. In 1892, the prior mortgagee brought a suit on his mortgage, and in 1895 obtained a decree absolute for sale under the Transfer of Property Act. The suit was, however, only against the mortgagor, and the second mortgagee was not made a party to it. Neither the prior mortgagee nor his successor took any steps to execute that decree, and it became barred and inoperative after the lapse of three years from the date on which it became absolute. It was admitted that the later mortgage was duly registered, and that the earlier mortgagee must be taken to have had notice of it when he brought his suit and obtained a decree in 1892.

Held in a suit brought on the 26th of July, 1910, by the first respondent on his mortgage of the 15th of October, 1881, against, among others, the appellant, respondent was entitled to a decree absolute under order XXXIV, rule 2, of the Code of Civil Procedure, 1908, for sale, but that the sale was not subject to the prior mortgage of the appellant.

The true construction of section 89 of the Transfer of Property Act is that on the making of the order absolute for sale under that section, the security as well as the defendant's right to redeem were both extinguished, and that for the right of the mortgagee under his security there was substituted the right to a sale conferred by the decree.

APPEAL 88 of 1916, from a judgement and decree (19th May, 1913) of the High Court at Allahabad, which varied a judgement and decree (19th December, 1911) of the Assistant Sessions Judge of Moradabad, exercising the powers of a Subordinate Judge.

* *Present*:—Viscount HALDANE, Sir JOHN EDGE, Mr. AMEER ALI, and Sir WALTER PHILIMORE, BART.

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The only question for determination in this appeal was whether certain property mortgaged to the plaintiff respondent should be decreed to be sold subject to a prior charge claimed by the defendant appellant.

The facts are sufficiently stated in the judgment of the Judicial Committee.

The case in the High Court was decided by Sir H. G. RICHARDS, C. J., and H. W. LYLE, J.

A. M. Dunne, K.C., and *T. B. W. Ramsay*, for the appellant, contended that he had a valid prior charge on the property mortgaged to the first respondent, which could only be sold subject to such prior charge. There was no merger of the mortgage rights when the appellant by his purchase succeeded to the rights of the original mortgagee, and became, it was submitted, entitled to the benefit of the mortgage of 1880. Reference was made to *Gokal Das, Gopal Das v. Puranmal Premsukhdas* (1); *Dinobundhu Shah Chowdhry v. Jogmaya Dasi* (2); and *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh* (3). Moreover, the first respondent was not a party to the decree made in 1891 in the prior mortgagee's suit, and the appellant's prior mortgage rights as against the first respondent were not extinguished. As to no steps having been taken to enforce the decree, the appellant was the owner of the property mortgaged, and could not enforce the decree against his own property.

B. Dube, for the first respondent, contended that the security of the prior mortgage became merged in the decree absolute and was extinguished by it. Owing to the omission to make the first respondent, as being the mortgagee of the second mortgage, a party to his suit (to which he was a necessary defendant under section 85 of the Transfer of Property Act), and the fact that the period of limitation for enforcing the decree began to run from the date of the decree being made absolute, and that after three years the decree became barred under article 179 of schedule II of the Limitation Act, 1877 [See *Mahabir Prasad v. Sital Singh* (4)], the rights which the appellant might otherwise have had against

(1) (1884) I. L. R., 10 Cal., 1035; L. R., 11 I. A., 126. (3) (1912) I. L. R., 39 Cal., 527 (555); I. R., 35 I. A., 68 (81, 82).

(2) (1931) I. L. R., 29 Cal., 154. L. R., 29 I. A., 9. (4) (1897) I. L. R., 19 All., 520.

the first respondent ceased to exist. The registration of the mortgage of 1881 gave the appellant notice of it; *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh* (1). Limitation ran uninterruptedly, as the interests of mortgagor and mortgagee became joined in one and the same person. The appellant, moreover, could have proceeded to enforce the decree under section 232 of the Code of Civil Procedure, 1882.

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A. M. Dunne, K. C., in reply, contended that the appellant not being the plaintiff the limitation provisions referred to were not applicable and the equitable right the appellant claims was not affected by section 28 of the Limitation Act. As he could not enforce the decree against his own property he should not be deprived of his mortgage rights by not doing so.

1918, *March, 15th* :—The judgment of their Lordships was delivered by Viscount HALDANE.

The material point in this appeal, which comes from the High Court of Judicature for the North-Western Provinces, Allahabad, lies in a short compass. The question in the suit was whether property in mortgage to the respondent Shadi Ram, as to which he had sought to obtain a decree for sale under order XXXIV, rule 2, of the Civil Procedure Code, 1908, should, when sold, be treated as sold subject to an alleged prior right of the appellant under an earlier mortgage. This earlier mortgage was dated the 25th of February, 1880, Shadi Ram's mortgage was dated the 15th of October, 1881.

The appellant had become the successor in title to the mortgagors, and it is assumed, for the purposes of this appeal, that he had also acquired such title as remained to the mortgagee under the earlier mortgage. In 1891 the prior mortgagee, whose name was Lachman Das, brought a suit on his mortgage and in 1895 obtained a decree absolute for a sale under the Transfer of Property Act. But the suit was brought only against the remaining mortgagor, and the second mortgagee was not made a party. This decree neither Lachman Das nor his successor in title took any steps to execute, and under article 179 of the second schedule to the Limitation Act, 1877, it ceased to be operative when three years had elapsed from the date of the decree becoming absolute.

(1) (1912) 1 L. R., 89 Cal., 527; L. R., 39 I. A., 68.

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It had thus become wholly ineffective long before the present suit was commenced. The only other observation which it is necessary to make before considering the question of law that arises under the Transfer of Property Act, 1882, is that on the admissions of the parties it is to be taken that the second mortgage was duly registered, and that the first mortgagee must be taken to have had notice of it when he brought his suit, and obtained a decree for sale in 1892.

The mortgage made to Lachman Das in 1880 was a simple mortgage within the meaning of section 58 of the Transfer of Property Act, and under section 67 the mortgagee had a right to obtain, as he actually did, an order for sale. The provisions of the Act, inasmuch as section 69 does not apply to a simple mortgage, precluded him from any right to sell without such an order. Under section 85, the first mortgagee was bound to make the second mortgagee a party to his suit for sale, and as he did not do so, the second mortgagee was not bound by the order for sale, which could only have been operative subject to his title. Section 89 is important. Under this section, where an order for sale under section 88 has been made, such as was made here in 1892, in favour of the first mortgagee, the mortgagor, or the second mortgagee, if he had been made a defendant, would have had the right to redeem if he had paid on the date fixed by the decree the amount due. If such payment is not made, a decree absolute may be passed, such as was made in 1895, for sale and for payment of the amount realized into Court. The section then provides that "the defendant's right to redeem and the security shall both be extinguished." The construction which their Lordships put on the language so used is that on the making of the order absolute the security as well as the defendant's right to redeem are both extinguished, and that for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree.

As their Lordships have already indicated, the second mortgagee, not having been made a party, was not affected by the decree made in the suit of 1892, and in addition the decree itself became inoperative under the Limitation Act as the result of nothing having been done under it. It follows that the title of the

second mortgagee, Shadi Ram, the first respondent, has remained in existence as the only encumbrance prior to the title of the appellant as owner of the equity of redemption.

They concur in the opinion of the learned Judges of the High Court that the decision of the Assistant Sessions Judge of Moradabad, who tried the case, was wrong.

They will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant:—*T. L. Wilson & Co.*

Solicitor for the plaintiff respondent:—*Pyke, Franklin & Gould.*

J.V.W.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

GIRDHAR DAS AND OTHERS (DEFENDANTS) v. SIDHESHWARI PRASAD NARAIN SINGH AND OTHERS (PLAINTIFFS)*.

Civil Procedure Code (1882), section 315—Execution of decrees—Sale in execution—Auction purchase: deprived of property purchased owing to failure of judgment-debtor's title—Suit to recover purchase money.

Where property of a judgment-debtor had been sold twice over in execution of decrees against him and purchased twice by different purchasers it was held that the second purchaser took no title by his purchase, inasmuch as at the time of sale the judgment-debtor's title was extinct, and that he was entitled to recover the purchase money which he had paid, and to follow it into the hands of other creditors of the judgment-debtor amongst whom it had been rateably distributed.

THE facts of this case were, briefly, as follows:—

Certain house property in the city of Benares, belonging to a man of the name of Rajendradhari Singh, was sold by auction in execution of a decree against the owner on the 15th of February, 1906, and was purchased by Ram Prasad Singh. The same property was, however, sold a second time as the property of Rajendradhari Singh on the 18th of March, 1907, and on this occasion was purchased by Sidheshwari Prasad Narain Singh and others. This led to litigation, to begin with, between the first purchaser and the second, resulting in a decision in favour of Ram

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* First Appeal No. 86 of 1916, from a decree of Udit Narain Singh, Subordinate Judge of Benares, dated the 12th of August, 1915.

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Prasad Singh. Thereafter the second set of purchasers sued to recover from other creditors of Rajendradhari Singh the purchase money which they had paid, and which had been rateably distributed amongst those creditors. The court of first instance decreed the plaintiffs' claim. Certain of the defendants appealed to the High Court.

Mr. *Jawahir Lal Nehru* and Munshi *Harnandun Prasad*, for the appellants.

Babu *Brij Nath Vyas* and Munshi *Kanhaya Lal*, for the respondents.

PIGGOTT and WALSH, JJ. :—The essential point raised by this first appeal is quite a simple one. Certain house property situated within the city of Benares belonged to one Rajendradhari Singh, who seems to have been heavily in debt. There were two auction sales of the house property in question—one on the 15th of February, 1906, resulting in a purchase by Ram Prasad Singh, and another on the 18th of March, 1907, resulting in a purchase by the present plaintiffs respondents. The latter paid their purchase money into court and that money passed under the orders of the court into the hands of a large number of creditors of Rajendradhari Singh, who had applied for rateable distribution in respect of any money which might be realized by the auction sale. Subsequently Ram Prasad Singh brought a suit, in which he impleaded the judgment-creditor on whose application the attachment resulting in the sale of the 18th of March 1907 had been made, and also the present plaintiffs, the auction purchasers at the said sale. The result of that suit was a decision, between these parties, that the same property had been sold twice over, first to Ram Prasad Singh in February, 1906, and then to the plaintiffs in March, 1907. It followed as a necessary consequence that on the date of the latter sale the judgment-debtor Rajendradhari Singh had no saleable interest in the property purchased by the plaintiffs. The latter had, therefore, obtained nothing by their purchase and became entitled to maintain a suit against all the judgment-creditors of Rajendradhari Singh to whom payments were made out of the money which the plaintiffs had paid into court. The law on this point is clearly settled, as may be

seen by referring to the cases of *Kishun Lal v. Muhammad Safdar Ali Khan* (1) and *Muhammad Najibullah v. Jai Narain* (2). The court below has accordingly decreed the plaintiffs' claim against a large number of defendants, in accordance with the sums found to be respectively due from each defendant, or group of defendants. The appeal now before us is by five of the defendants only. The question as to the maintainability of the suit must be decided against the appellants in accordance with the rulings above referred to. The question whether the present suit was or was not within limitation has already been up to this Court in appeal and has been decided in the plaintiffs' favour. The report may be found in I. L. R., 35 All., 419.

There are pleas taken in the memorandum of appeal before us which are apparently intended to suggest that the decision in the suit brought by Ram Prasad Singh has in some way been used against the present defendants improperly in this litigation. The plaintiffs were obviously entitled to prove that they had lost the benefit of their auction purchase by reason of the fact that Ram Prasad Singh had succeeded in proving that he had himself purchased identically the same property at the auction sale of February, 1906. This fact could most readily be proved by the record of the suit in which Ram Prasad Singh was the plaintiff and the present plaintiffs, along with the attaching creditor of Rajendradhari Singh, were the defendants. Beyond this we do not think that the court below has made any use of the record of this previous litigation. The contesting defendants, other than original attaching creditor, were allowed to raise every question of fact which could have been raised by them if they had been defendants in the suit brought by Ram Prasad Singh. They could not as a matter of fact have been made defendants in that suit, because it had been instituted before the order for rateable distribution of the sale proceeds of the sale of March, 1907, had been passed. This, however, we only mention incidentally. The questions of fact requiring determination at this trial were the identity or otherwise of the property purchased at the two sales, of February, 1906 and March, 1907, and, secondly, the validity or

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(1) (1891) I. L. R., 18 All., 388. (2) (1914) I. L. R., 36 All., 529.

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otherwise of the plea taken by these defendants that Ram Prasad Singh was merely a *benami* purchaser for the benefit of the judgment-debtor, Rajendradhari Singh. The identity of the properties sold at the two auction sales has been established by abundant evidence, and the point scarcely admits of argument. The truth of the matter is that Rajendradhari Singh had purchased a number of contiguous houses in the city of Benares and had then built himself a residence, with suitable out-houses and other appurtenances, situated within one single enclosure covering the sites of the various houses purchased by him. At both the auction sales everything within the enclosure, the boundaries of which were clearly specified in the sale proclamation, was put up for sale and was purchased by Ram Prasad Singh in February, 1906, and by the present plaintiffs in March, 1907. There is no force in the contention that different house numbers were mentioned in the sale proclamations of the two years. The identity of the property sold is sufficiently established by the sale proclamations and by the evidence of the court official who conducted the sales. Ram Prasad Singh was at any rate the ostensible purchaser at the sale of February, 1906. The evidence by which the defendants in this suit have sought to show that he was a *benamidar* for Rajendradhari Singh is of very little substance. Certain evidence has been produced tending to show that Rajendradhari Singh was in funds in the month of February, 1906, so that he could have made this purchase if he wanted to do so. The case for the defendants can scarcely be said to go beyond this. It is true that Ram Prasad Singh does not appear to have taken as yet effective possession of the whole of the property sold to him; but the evidence on the record supplies abundant explanation of this fact. When the time for delivery of possession came, Rajendradhari Singh was lying seriously ill inside the house, and it would seem that he died there shortly afterwards. The evidence for the defendants does not carry us beyond the fact that Ram Prasad Singh has not hitherto taken steps to evict Rajendradhari Singh's widow from the premises. This may be due to sympathetic consideration on his part, or it may be that he does not desire to contest the possible question of the widow's right of residence. Moreover, it must be remembered that Ram

Prasad Singh's position has been complicated by the subsequent auction sale of 1907 and by the litigation in which he has been involved in order to enforce his title. The decision of the High Court in his favour was not pronounced until the month of November, 1909. On the whole, there seems no valid basis for a finding that the purchase effected by Ram Prasad Singh at the auction sale of February, 1906 was *benami* on behalf of the judgment-debtor, or was anything but a *bond fide* purchase for his own benefit. The defendants have further raised another very curious plea, suggesting that the auction purchase by the plaintiffs themselves in the month of March, 1907 was also *benami*, on behalf and for the benefit of Rajendradhari Singh or his heirs. In fact this seems to have been treated as the main issue in the case. We have been taken through the evidence on the point, and it is really unnecessary for us to say more than that we find no reason for dissenting from the opinion formed by the trial court regarding that evidence. We can find no real reason for doubting that the purchase money paid in connection with the auction sale of March, 1907 was found by the plaintiffs themselves and that the purchase was effected on behalf of the plaintiffs, for their benefit, by their agent, Sheodhar Prasad.

The only remaining plea in the memorandum of appeal before us is that Ram Prasad Singh's decree invalidating the sale of March, 1907, and affirming the validity of his own purchase at the sale of February, 1906, was obtained by some sort of fraudulent collusion between himself and the then defendants. There is no basis for that contention, beyond the fact that the present plaintiffs did not choose to appeal against Ram Prasad Singh's decree; but the matter was fully fought out by the principal defendant, the attaching judgment-creditor, and the essential issues of fact were found in favour of Ram Prasad Singh after contest, as they have again been found in his favour after contest in the present litigation. There is therefore no force in this appeal. We dismiss it with costs.

Appeal dismissed.

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REVISIONAL CRIMINAL.

Before Mr. Justice Piggott.

EMPEROR v ABDUL LATIF.*

Criminal Procedure Code, section 437—Accused discharged by Magistrate—Order for further inquiry—Notice—Judicial discretion—Practice.

Nothing in section 437 of the Code of Criminal Procedure requires previous notice to be given to any accused person who has been discharged before further inquiry into his case is ordered by a competent authority, that is, by the High Court, or the Sessions Judge, or the District Magistrate. Nevertheless as a matter of judicial discretion it is advisable that previous notice should issue when the matter for consideration is the setting aside of an order of discharge in favour of the accused person who has been actually before the court to answer the facts alleged against him. *Queen-Empress v. Ajudhia* (1) referred to.

THE facts of this case were as follows :—

On the 17th of July, 1917, a woman named Dojia was struck by a bullet while she was with her husband in a field where he was working. The shot had been fired by some sportsman in the immediate neighbourhood, and it was not suggested that the injury to Musammat Dojia was anything but accidental. A number of villagers were attracted to the spot and proceeded to arrest two Muhammadans, named Abdul Latif Khan and Badal Khan, as being responsible for the injury caused to Musammat Dojia. These two men were taken to the Kasganj Police Station, some five miles distant, along with the injured woman and her husband, and at the same time there was produced at the police station a double-barrelled muzzle-loading gun. The two Muhammadans arrested on suspicion were admittedly strangers to Musammat Dojia and her neighbours. The police eventually sent up one of these men, Abdul Latif Khan, for trial in respect of offences under section 338 of the Indian Penal Code and section 19 of the Indian Arms Act. The Magistrate who took cognizance of the matter began by issuing process against the other stranger, Badal Khan; but after taking the evidence, discharged both the accused persons. The order of discharge is dated the 21st of September, 1917. The gun in question, although

* Criminal Revision No. 945 of 1917, from an order of H. P. Fawcett, t Magistrate of Etah, dated the 10th of November, 1917.

(1) (1898) 1 L.R., 20 All., 339.

bearing a serial number and therefore having apparently at some time or other been held lawfully under a licence, could not be traced in the Etah district, and it is admitted that Abdul Latif Khan and Badal Khan held no licence to possess fire arms of any description. Representations were made to the District Magistrate as to the impropriety of the order of discharge, and on the 10th of November, 1917, the District Magistrate, after examining the record, passed an elaborate order, reviewing the evidence, discussing the comments made on the same by the trying Magistrate and finally directing further inquiry to be made as regards Abdul Latif Khan. Against this order Abdul Latif applied in revision to the High Court.

Mr. A. H. C. Hamilton, for the applicant.

The Assistant Government Advocate (Mr. R. Malcomson), for the Crown.

PRIGGOTT, J.:—This application in revision arises on the following state of facts:—On the 17th of July last, a woman named Dojia was struck by a bullet while she was with her husband in a field where he was working. The shot had been fired by some sportsman in the immediate neighbourhood, and it is not suggested that the injury to Musammat Dojia was anything but accidental. A number of villagers were attracted to the spot and proceeded to arrest two Muhammadans, named Abdul Latif Khan and Badal Khan, as being responsible for the injury caused to Musammat Dojia. These two men were taken to the Kasganj Police Station, some five miles distant, along with the injured woman and her husband, and at the same time there was produced at the police station a double-barrelled muzzle-loading gun. The two Muhammadans arrested on suspicion were admittedly strangers to Musammat Dojia and her neighbours. The police eventually sent up one of these men, Abdul Latif Khan, for trial in respect of offences under section 338 of the Indian Penal Code and section 19 of the Indian Arms Act. The Magistrate who took cognizance of the matter began by issuing process against the other stranger, Badal Khan; but after taking the evidence, discharged both the accused persons. The order of discharge is

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tunc or other been held lawfully under a licence, could not be traced in the Etah district, and it is admitted that Abdul Latif Khan and Badal Khan held no licence to possess fire-arms of any description. Representations were made to the District Magistrate as to the impropriety of the order of discharge, and on the 10th of November, 1917 the District Magistrate, after examining the record, passed an elaborate order, reviewing the evidence, discussing the comments made on the same by the trying Magistrate, and finally directing further inquiry to be made as regards Abdul Latif Khan. This order was of course passed under section 437 of the Code of Criminal Procedure. It is quite clear that no previous notice had been issued to Abdul Latif Khan to show cause why the order of discharge passed in his favour should not be set aside. A curious feature of the case is that before that order had been set aside at all, that is to say, on the 7th of November, 1917, another first class Magistrate of the Etah district had taken cognizance of the offence and had issued process to Abdul Latif Khan to appear and answer charges under section 338 of the Indian Penal Code and section 19 of the Indian Arms Act. However, the question whether Abdul Latif Khan could have been re-tried by another Magistrate without the order of discharge passed on the 21st of September, 1917 being first set aside, is not now before me and I need not discuss it. The application in revision which I have to consider is against the District Magistrate's order of the 10th of November, 1917. Now it is beyond question that nothing in section 437 of the Code of Criminal Procedure requires previous notice to any accused person who has been discharged before further inquiry into his case is ordered by a competent authority, that is to say, by the High Court, or the Sessions Judge, or the District Magistrate. Nevertheless it has been laid down in a number of cases that as a matter of judicial discretion it is advisable that previous notice should issue, when the matter for consideration is the setting aside of an order of discharge passed in favour of an accused person who has actually been before a court to answer the facts alleged against him. I am not aware that the decision of this Court in *Queen-Empress v. Ajudhia* (1),

(1) (1898) 1 L. R., 20 All, 339.

which itself follows certain older decisions, has ever been disapproved of in any subsequent decision of this Court. I am myself of opinion that in a matter of this sort it would have been better for the District Magistrate to give Abdul Latif Khan previous notice and an opportunity of arguing the case before him. I am not disposed, however, to interfere with the order of the court below merely on this ground. If the only result of my doing so were to compel the District Magistrate to issue notice now to Abdul Latif Khan, this might only lead to the passing of another order under section 437 of the Code of Criminal Procedure, and the only result would have been inconvenience to the courts and undesirable delay in the disposal of the matter. If, on the other hand, I were to take it upon myself to direct that no further proceedings be taken, I conceive that I should be straining the powers of this Court, and I am not satisfied that I should not be prejudicing the interests of justice. I have preferred to deal with the matter by asking the learned advocate who represents Abdul Latif Khan to take this opportunity of showing cause why further inquiry should not be ordered. In substance I have dealt with the matter as if the record had been called for directly by this Court with a view to considering the propriety of the order of discharge. I do not think it would be advisable for me to enter into detail with regard to the very different opinions expressed by the trying Magistrate and by the District Magistrate in respect of the value and reliability of the evidence produced at the original hearing. I do think, however, that the District Magistrate's order shows good and sufficient cause for further inquiry into this matter in the interests of justice. It seems practically beyond question that an offence punishable under the Indian Arms Act, as well as an offence punishable under Indian Penal Code, were committed by some person or other on the occasion in question. I agree with the District Magistrate that it is in the interests of justice that there should be further inquiry into the question whether the commission of one or both of these offences is or is not brought home to the accused Abdul Latif Khan. I think it advisable under the circumstances that this inquiry should take place outside the limits of the territorial jurisdiction of the District Magistrate of

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Etah. My order, therefore, is that this application for revision do stand dismissed, and that the further inquiry against Abdul Latif Khan directed by the order of the 10th of November, 1917 be held in the district of Aligarh. I transfer the case in question to the court of the District Magistrate of Aligarh, who may either dispose of it himself or transfer it for disposal to the court of any first class Magistrate subordinate to himself.

With regard to one matter of detail which has been pressed upon my notice, I may say that I agree with the District Magistrate that the proceedings taken against Badal Khan were injudicious, and that the fact of his having been in the position of an accused person during the inquiry which resulted in the order of discharge should in no way be considered to prevent his being summoned as a witness in the further inquiry now ordered.

Application dismissed.

APPELLATE CRIMINAL.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Tudball.

EMPEROR v. GHULAM HUSAIN.*

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March, 1.

Act No. XI of 1878 (Indian Arms Act), section 19 (f)—Arms—Finding as to factum of possession of unlicensed arms—Minor, near his majority, living with his elderly parda-nashin mother—Possession attributed to son.

A parda-nashin lady and her minor son, a young man of some 17 years of age, lived together in the family house. In their house was a small collection of arms of various kinds which had belonged to the father, who, as an honorary magistrate, was exempt from the operation of the Arms Act. There was evidence that the arms were kept clean and that the son at all events took a certain amount of interest in them.

Held that a finding that the son was in possession of these arms, and, not having a licence for them, was liable to conviction for an offence under section 19 (f) of the Indian Arms Act, 1878, was not open to objection.

THE facts of this case are stated in the judgment of the Court.

The Government Advocate (Mr. A. E. Ryves), for the Crown. Mr. C. Ross Alston and Mr. Abdul Raoof, for the opposite party.

BANERJI and TUDBALL, JJ. :—This is a Government appeal against an order of acquittal passed by the Additional Sessions

* Criminal Appeal No. 93 of 1918, by the Local Government from an order of acquittal passed by Abdul Ali Khwaja, Additional Sessions Judge of Gorakhpur, dated the 24th of November, 1917.

Judge of Gorakhpur in the case of the opposite party Sheikh Ghulam Husain, who had been convicted by a Magistrate of the first class for an offence under section 19, clause (f), of Act XI of 1878 (The Arms Act). The facts are simple. Sheikh Ghulam Husain is the son of one Khadim Husain, who died in 1901. The family is of good social position and owns considerable property. Khadim Husain was an Honorary Magistrate and as such was exempt from the operation of the Arms Act. The family lives in a three storied *pacca* building at Ganeshpur. At the death of Khadim Husain, Ghulam Husain was a boy of tender years. His younger brother was born a few months after his father's death. Musammât Amina Bibi is the widow of Khadim Husain. Apparently, after the death of Khadim Husain, the weapons which he had in his possession remained in the family residence and no steps were taken to obtain a licence for their possession. Ghulam Husain has grown up and at the time that this case occurred, was on the verge of majority, being between the ages of 17 and 18 years. On the 12th of September, 1917, at 3 p.m., in the absence of Musammât Amina Bibi and of Ghulam Husain, the family house was searched and in it were found, in the *zenana* quarters, locked up in *almirahs*, three guns, 8 swords, one dagger, one *kukri* and three old pistols. At the same time in the house were also found some spears, on one of which was engraved Ghulam Husain's name. The weapons were all in good condition and apparently had been kept properly cleaned. There was some evidence given in the case to the effect that Ghulam Husain had been seen out in the open accompanied by a servant carrying a gun some days previous to the search. The Magistrate who tried the case held that the accused was in charge of the guns, that they were under his control and that he was responsible for their possession without a licence under the Act. He therefore convicted him and sentenced him to a fine of Rs. 1,000. On appeal the learned Additional Sessions Judge has held that the mother, Musammât Amina Bibi, being the manager of the family, is the person who in law must be deemed to have been in possession of these weapons; that the accused being a minor cannot be held to have been in possession and therefore ought not to have been convicted.

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He accordingly set aside the conviction and sentence and acquitted Ghulam Husain. It is from this acquittal that the Local Government has preferred this appeal. It is true that Ghulam Husain was not of full age at the time that these weapons were recovered but there is nothing in law which prevents a minor from being in actual fact in possession of arms without a licence or which prevents him from being guilty of an offence under section 19, clause (f), of the Act. It is difficult for us to believe that a *parda-nashin* lady like Musammat Amina Bibi would have taken any care or specially retained in her possession the weapons which were found in her house. It is clear that these weapons were retained and that they were cleaned and properly looked after. In the same room with these weapons was the spear belonging to Ghulam Husain himself on which his name was engraved and it is clear, therefore, that he took an interest in the weapons. There is, we think, good reason to believe that they were in his custody and under his control, and that he has, as a matter of fact, committed the offence under section 19, clause (f), of the Act. Whether his mother has committed the same offence or not is not a question which we have to decide in this appeal, but we can see nothing in the present case to prevent it being held on the evidence that the weapons were under the control of Ghulam Husain and not of his mother. In the circumstances of the case we do not think that so heavy a fine as Rs. 1,000 was called for. Khadim Husain left behind him a *parda-nashin* woman as a widow and a small boy. These weapons had probably been lying in the house for years owing more or less to the neglect of the District Magistrate in not having taken proper action on the death of Khadim Husain. The offence committed is one for which a more or less nominal punishment will suffice. We therefore allow the appeal, set aside the order of acquittal and restore the conviction of Ghulam Husain under section 19, clause (f), of the Arms Act and sentence him to pay a fine of Rs. 100, or in default to one month's simple imprisonment.

Appeal allowed.

APPELLATE CIVIL.

1918
March, 2.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada
Charan Banerji.

SRIPAT NARAIN RAI (OPPOSITE PARTY) v TIRBENI MISRA
(PETITIONER).*

Civil Procedure Code (1908), order XXI, rule 7—Execution of decree—Decree passed against a deceased person—Objection by alleged representatives of the deceased judgment-debtor that the decree is a nullity and incapable of execution against them.

It is a good answer to an application for execution against the alleged representatives of a judgment-debtor to show that the judgment-debtor was dead at the time that the decree was made, and that such decree is void and incapable of execution as against the person so dead *Imdad Ali v Jagan Lal* (1) followed

IN this case a decree for pre-emption was obtained against three persons, one of whom was Bindeshri. Bindeshri having died, an application for execution was made against the surviving judgment-debtors and also against the sons of Bindeshri as his legal representatives. The sons of Bindeshri objected that as a matter of fact Bindeshri had died before the decree against him was passed, and that therefore, so far as he was concerned, the decree was a nullity and could not be executed against them. The lower appellate court dismissed the application for execution against the sons of Bindeshri as his legal representatives. The decree-holder appealed to the High Court.

Munshi *Haribans Sahai*, for the appellant.

Munshi *Iswar Saran*, for the respondent.

RICHARDS, C. J., and BANERJI, J. :—This appeal arises out of execution proceedings. It appears that a decree for pre-emption was obtained against three persons, one of whom was Bindeshri. It is alleged, and it is possibly correct, that all the three persons constituted a joint Hindu family. The question of jointness is not now before us. Bindeshri died, and the present application was for execution against the surviving defendants and also against the sons of Bindeshri as his legal representatives. It

* Execution Second Appeal No. 686 of 1917 from a decree of W. R. G. Moir, District Judge of Gorakhpur, dated the 1st of March, 1917, reversing a decree of Syed Muhammad Sand-Ud-din, Munsif of Bansgaon, dated the 30th of September, 1916.

(1) (1895) L. J. R. 17 All. 478.

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was objected that Bindeshri had died before the decree was made. Having regard to the order of the court below and to what happened when this case was before us on a previous occasion, we intend to deal with the case on the assumption that Bindeshri was dead at the time the decree was made against him. The lower appellate court has dismissed the application for execution as against the sons of Bindeshri as his legal representatives. This Court has held in the case of *Imdad Ali v. Jagan Lal* (1) that it is a good answer to application for execution against the alleged representatives of a judgment-debtor to show that the judgment-debtor was dead at the time the decree was made, and that such a decree is void and incapable of execution as against the person so dead. This is an authority which we think we ought to follow unless it can be shown that it is no longer law. It is contended that there has been a change in the new Code of Civil Procedure by the omission from order XXI, rule 7, of the word "jurisdiction." We think that this alteration in no way modifies the authority of the case to which we have referred. No question of "jurisdiction" of the court to make the decree arises because no court can make a decree against a dead man; and a decree so made is a nullity. In this view we think the decision of the court below was correct. It is suggested that as the family is joint it was sufficiently represented by the members of the family who were alive when the decree was made, and that it is unnecessary that the sons of Bindeshri should be named as judgment-debtors. A good deal might be said for this contention, particularly if the pre-emption money is accepted by the joint family, but we have not to decide this matter in the present appeal. We express no opinion as to what the effect of the execution of the decree against the surviving defendants will be. But we think the court below was justified in dismissing the application for execution against the sons of Bindeshri *as his legal representatives*. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) (1895) I. L. R., 17 All., 478.

REVISIONAL CIVIL.

*Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Parmada
Chaman Banerji.*

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March, 5

FAZAL RAB (APPLICANT) v MANZUR AHMAD AND OTHERS
(OPPOSITE PARTIES).*

*Civil Procedure Code (1908), order XXI, rules 89 and 92—Execution of decree—
Application to set aside sale in execution—Decree sent to Collector for
execution—Tender of money to the Collector, the Civil Courts being
closed—"Court."*

The word "Court" as used in rules 89 and 92 of order XXI of the Code of Civil Procedure means the Civil Court, and not, in the case of a decree being transferred to the Collector for execution, the Collector.

THE facts of this case were as follows :—

In execution of a simple money decree against him, certain non-ancestral zamindari property of the judgment-debtor was sold by the Collector on behalf of the Civil Court. The sale was held on the 20th of September, 1916. The Civil Courts being closed on account of the long vacation in October, 1916, the applicant made an application to the Collector for leave to deposit the sum necessary for getting the sale set aside under order XXI, rule 89, and on such leave being granted, deposited the requisite amount in the treasury on the 16th of October, 1916. On the 11th of November, 1916, the day on which the Civil Courts reopened, he applied to the Munsif under order XXI, rule 89, of the Code of Civil Procedure and stated that he had already deposited the money in the treasury. The Collector also sent an intimation of the said deposit to the Civil Court and asked for further instructions. In December, the Munsif directed the Collector to transfer the said amount to the Civil Court account in the treasury. The auction purchaser opposed the application of the judgment-debtor on the ground that as the money had not been deposited in court along with the application, the application could not be allowed. The Munsif set aside the sale. On appeal, the Subordinate Judge reversed the order, and confirmed the sale. The judgment-debtor applied to the High Court in revision.

Pandit Kailas Nath Katju (with him Babu Piari Lal Banerji), for the applicant, submitted that the applicant was in

* Civil Revision, No. 190 of 1917.

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fact being punished for his abundant caution and diligence. He had deposited the money well within time with the Collector, who was an officer of the court, and the money was in deposit in the treasury at the disposal of the court. The view taken by the lower appellate court that the applicant should have withdrawn the money from the treasury and re-presented it in the Civil Court on the 11th of November, was too narrow and technical and calculated to defeat the ends of justice. Even in that case the money would have been actually deposited in the treasury where it already was. Moreover, the court had received an intimation of the deposit from the Collector within time, and a direction as to transfer in the account-books was a pure formality. It was true that the provisions of order XXI, rule 89, of the Code of Civil Procedure were by way of an indulgence to the judgment-debtor and must be strictly complied with, but in this case the judgment-debtor had acted *bonâ fide* and with due diligence and the sale had been rightly set aside by the court of first instance. As to the jurisdiction of the High Court to interfere in revision, it was submitted that the lower appellate court had acted without jurisdiction, inasmuch as the provisions of order XXI, rule 89, were mandatory, and as they had been duly complied with, the court had no discretion in the matter but was bound to set aside the sale. A refusal on the part of the court to do so was in effect a refusal to exercise jurisdiction, and in any event the court had acted in the exercise of its jurisdiction illegally and with material irregularity. Reference was made to *Brij Mohun Thakur v. Rai Uma Nath Chowdhury* (1), and to the judgment of WOODROFFE, J. in *Shew Prosad Bungshidhur v. Ram Chunder Haribux* (2). It was further submitted that the auction purchaser had no right of appeal to the lower appellate court against the order of the primary court. He had got his money back *plus* five per cent. as a compensation and was not a party to the execution proceedings. He had bought subject to the contingency of the sale being set aside on payment by the judgment-debtor under order XXI, rule 89.

Dr. S. M. Sulaiman (with him Mr. T. N. Chadda), for the auction purchaser, submitted that the provisions of order XXI, (1) (1892) I. L. R., 20 Cal., 8. (2) (1913) I. L. R., 41 Cal., 823 (341).

rule 89, were stringent and must be strictly complied with to the letter. The money was not deposited in court. The Collector was only a sale officer and not the court.

Pandit *Kailas Nath Katju*, was heard in reply.

RICHARDS, C. J., and BANERJI, J. :—The facts connected with this application may be stated very shortly. There was a decree for about Rs. 1,000. Certain property of the judgment-debtor was directed to be sold. The sale was held by the Collector on behalf of the Civil Court. The sale took place on the 20th of September, 1916. The property was put up to the sale and fetched Rs. 850. On the 15th of October, the judgment-debtor came to the Collector and stated that he was anxious to have the sale set aside and to save the property; that he could not deposit the decretal amount *plus* five per cent. compensation to the auction purchaser as the Civil Court was closed, but he was anxious to lodge the money in the Treasury. The money was accepted by the Collector. On the 11th of November, which was the day on which the Civil Court opened, the judgment-debtor applied to have the sale set aside and stated how the money had been already deposited in the treasury. There was a *rubkar* from the treasury to the effect that the money had been deposited. In December following the Civil Court directed that the money should be transferred to the account of the Civil Court. The court of first instance, thereupon, set aside the sale holding that the money had been deposited within thirty days. The auction purchaser appealed, and the lower appellate court held that the money had not been deposited within thirty days or on the 11th of November, which was the day on which the Civil Court opened, and accordingly the rule had not been complied with and the auction purchaser was entitled to the benefit of his purchase. The judgment-debtor has applied in revision. There is no appeal from the orders of the lower appellate court refusing to set aside the sale. It is contended in the first place that the money was in fact deposited within the meaning of the rule and that consequently the lower appellate court had no jurisdiction to refuse to set aside the sale, and in the second place that the court of first instance having set aside the sale no appeal by the auction purchaser lay to the lower appellate court.

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Rule 89 provides "where immovable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in court, (a) for payment to the purchaser a sum equal to five per cent of the purchase money, and (b) for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder."

Rule 92, clause 2, provides "that where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of the sale, the court shall make an order setting aside the sale."

The question which the court below had to decide was whether or not the money had been deposited in court. It is quite clear that "court" means the Civil Court. This was a question which admittedly the lower appellate court had not only jurisdiction but was bound to decide. It is somewhat difficult to say whether the court was not technically right in holding, unfortunate though the judgment-debtor may have been, in strictness that the money was not deposited in court within thirty days or on the 11th of November, which was the first day the court opened. It was not until December following that the money was accepted in the Civil Court by ordering the transfer of the deposit to the Civil Court account. It has been decided by their Lordships of the Privy Council that the High Court is not entitled to create what are really appeals put forward in the shape of revisions, and accordingly, even if we thought that under the exceptional circumstances of this case the lower appellate court might very well have upheld the court of first instance, this would not justify us in interfering with the decision of the lower appellate court in revision.

In this connection it must be remembered that the deposit of the purchase money *plus* 5 per cent. compensation of the decretal amount to the auction purchaser is an indulgence to the judgment-debtor. The auction purchaser is entitled to the benefit of his purchase unless the section has been strictly and completely

complied with. We think that the question whether or not the section has been complied with completely was clearly a question which the court below had jurisdiction to decide, that it exercised its jurisdiction, and that, even if we thought it had come to an erroneous conclusion, we would not have been entitled to interfere in revision.

As to the second contention, namely, that an auction purchaser has no right to appeal. The Code undoubtedly gives a right of appeal against an order setting aside the sale. The party mainly affected by the setting aside of the sale is the auction purchaser, and the Code provides that the sale should not be set aside without notice to him. We think it would be most unreasonable to hold that the Code restricts the right of appeal to the decree-holder or judgment-debtor. We think the application fails and we accordingly dismiss it with costs.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Abdul Raoof.

MITHAN LAL (PLAINTIFF) v. CHHAJU SINGH (DEFENDANT).*

*Usufructuary mortgage—Lease of mortgaged property by mortgagee to mortgagor
—Sale of equity of redemption to a third party in execution of a decree
for arrears of rent—Liability of thekadar for rent.*

Defendant, being the owner of a zamindari share, made a usufructuary mortgage of it in favour of the plaintiff. On the same date the plaintiff executed a lease of the same property for the term of the mortgage. Defendant fell into arrears with his rent, and plaintiff sued him and obtained a decree, in execution of which he brought to sale defendant's equity of redemption under the mortgage and it was purchased by a third party; the purchaser, however, did not obtain mutation of names in his favour.

Held, on a fresh suit brought by the lessor for arrears of rent accruing due since the sale of the equity of redemption, that the defendant was still liable for payment of rent as *thekadar*.

The facts of this case were as follows:—

The defendant usufructuarly mortgaged his zamindari to the plaintiff on the 23rd of July, 1908. On the same day the

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* Second Appeal No. 757 of 1916, from a decree of L. Johnston, District Judge of Meerut, dated the 23rd of February, 1916, modifying a decree of Brij Krishna Rama, Assistant Collector, First class, of Bulandshahr, dated the 15th of November, 1915.

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plaintiff executed a lease of the mortgaged property to the defendant, who remained in possession as *thekadar* paying rent to the plaintiff under the lease. On the 26th of June, 1912, the plaintiff sued him for arrears of rent, obtained a decree and in execution thereof put up the defendant's equity of redemption to auction sale. At that sale, held on the 20th of March, 1913, the equity of redemption was purchased by Bhuttu Mal. The present suit was brought by the plaintiff for arrears of rent against the defendant for a period partly prior and partly subsequent to the 20th of March, 1913. The defendant denied his liability for this latter period, on the ground that his equity of redemption had been sold. The Assistant Collector held that the purchase by Bhuttu Mal of the equity of redemption did not affect the lease at all, which was subsisting, and the suit was decreed in full. On appeal, the District Judge held that on the sale of the equity of redemption the defendant became the ex-proprietary tenant of the land, and that as no rent had been fixed by the Collector after the accrual of the ex-proprietary rights the plaintiff could not sue for rent for the period subsequent to the 20th of March, 1913. The plaintiff appealed to the High Court.

Babu *Sital Prasad Ghosh*, (with him Pandit *Uma Shankar Bajpai*), for the appellant, submitted that the usufructuary mortgage of 1908 was a transfer within the meaning of section 10 of the Tenancy Act, and consequently the defendant then became by virtue of the law the ex-proprietary tenant of the plaintiff. The District Judge was in error in holding that a fresh ex-proprietary right accrued to the defendant upon the sale of the equity of redemption. It was not necessary that there must be an order fixing rent under section 36 of the Land Revenue Act in all such cases, and there was nothing to prevent the parties coming to an agreement as to the amount of rent for a particular ex-proprietary holding, provided only that the rent was not greater than that indicated by section 10 of the Tenancy Act. What the law sought to provide was that an ex-proprietary tenant should not be permitted to contract himself out of the benefits conferred upon him by section 10; and it was not suggested by the defence in the present suit that the rent fixed in the lease was in excess of the statutory rent. The case of

Prag v. Sital Prasad (1), was not against the appellant ; on the other hand, it was really in his favour. The judgment of Mr. TWEEDY in the case of *Musammat Ram Kuari v. Badri Singh* (2), went further than the law on the subject and ought not to be accepted.

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Munshi *Haribans Sahai*, for the respondent :—

Ex-proprietary rights arose in favour of the defendant on two occasions, (1) when he made the usufructuary mortgage and (2) when his equity of redemption was sold. The mere fact that he did not claim ex-proprietary rights on the first occasion could not operate to prevent the accrual of such rights for all time to come. He became, by operation of law, an ex-proprietary tenant on the sale of the equity of redemption, and unless the rent was fixed by the Collector the appellant could not sue for arrears of rent. Whatever may have been the law under Act XII of 1881, it is now clear, having regard to the provisions of section 10 of the present Tenancy Act and section 36 of the Land Revenue Act, that the rent of an ex-proprietary tenant cannot be fixed by private arrangement. In any case, having regard to the Full Bench ruling in *Debi Prasad v. Bhagwan Din* (3), the defendant became the ex-proprietary tenant of all the proprietary body, and the present suit is not maintainable. Then, reading together the two deeds of the 23rd of July, 1908, and having regard to the fact that the net rent reserved by the *theka* was equal to the interest on the mortgage money, the meaning is clear that the lease subsisted only so long as the defendant continued to be the mortgagor. When the equity of redemption was sold the defendant was no longer bound to pay the rent fixed by the lease ; he was thereafter cultivating the land as an ex-proprietary tenant and was liable to pay only the statutory rent. The parties could not contract themselves out of the law. Reference was made to *Prag v. Sital Prasad* (1), *Musammat Ram Kuari v. Badri Singh* (2), and *Moti Chand v. Ikram-ullah Khan* (4). In any case an issue ought to be remitted to find out whether the rent reserved is or is not in excess of the statutory rent.

^{*}(1) (1914) I. L. R., 36 All., 155 (3) (1912) I. L. R., 35 All., 27.

(2) (1918) Board's Select Decisions, (4) (1916) I. L. R., 39 All., 173.

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TUDBALL and ABDUL RAOOF, JJ. :—This is a plaintiff's appeal. The facts out of which it has arisen are briefly as follows :—The defendant was the owner of a certain zamindari share, the area of which was some 13 bighas odd. On the 23rd of July, 1908, he gave a usufructuary mortgage of this zamindari to the plaintiff. On the same date the plaintiff gave him a lease of the same zamindari share on payment of a sum of Rs. 70-14-0 per annum *plus* Rs. 23-11-0 Government demand, etc. The defendant remained in possession as *thekadar* paying his rent to the plaintiff under the lease. On the 26th of June, 1912, the plaintiff sued him on the basis of that agreement for arrears of rent and obtained a decree and in execution of his decree for the arrears of rent due under the lease, he attached and put to sale the defendant's equity of redemption. This was sold on the 20th of March, 1913, and was purchased by one Bhuttu Mal. At the time of the sale the plaintiff's mortgage and one other mortgage were also notified. The price paid for the property at the sale was Rs. 40. Bhuttu Mal did not apply for mutation of names, and the Government record still stands as it was on the date of the original mortgage. The plaintiff has now, on the basis of the lease, sued his *thekadar*, the defendant, for the rent for a period which commenced prior to the 20th of March, 1913, and runs up to a date subsequent to that date. The defendant in his written statement merely pleaded that he was liable for the rent up to the 20th of March, 1913, but that for the period subsequent to that he was no longer liable under the lease because his equity of redemption had been sold and purchased by Bhuttu Mal. The court of first instance in the course of its judgment made the remark that "the mortgagor's right to redeem had been put to auction by the plaintiff decree-holder who *had purchased it for Bhuttu Mal* on the 20th of March, 1913." It is quite clear that the defendant had nowhere pleaded that Bhuttu Mal was the *benamidar* of the plaintiff or that Bhuttu Mal had purchased the property for and on behalf of the plaintiff. There was no issue on this point. There was no allegation or denial; no evidence and no finding. The court of first instance held that the purchase by Bhuttu Mal of the defendant's equity of redemption did not affect the case at all, that the lease subsisted, and that the defendant was liable under

the lease. It accordingly decreed the suit. The lower appellate court on the defendant's appeal has held that after the 20th of March, 1913, the defendant became the ex-proprietary tenant of the land because the equity of redemption had been sold; that he was entitled to take up his position as an ex proprietary tenant and as no rent had been fixed, he was not liable to pay any rent for the period subsequent to the 20th of March, 1913. The plaintiff appeals. It is quite clear to us that the judge of the court below has misunderstood the nature of the plaintiff's claim. It is based on the *theka* which was given to the defendant on the 23rd of July, 1908. We will assume that the defendant is the ex-proprietary tenant of the land. He is equally a *thekadar* under the contract of the 23rd of July, 1908. If the period of that contract has come to an end, then of course the plaintiff's claim must fail because the *theka* no longer subsists; but, so long as the *theka* subsists, the plaintiff is entitled to recover from his *thekadar* the rent which the latter has agreed to pay. He may as an ex-proprietary tenant be a tenant of the land under himself as *thekadar*. If the *theka* had been given to an outside person, there is no question that so long as it subsisted the *thekadar* would be liable for the rent. The lower court in its judgment has stated that Bhuttu Mal appears to have been a *benamidar* for the plaintiff. It has, however, come to no decision on the point, nor could it do so, for the simple reason that the issue had not been raised, no evidence taken upon it, and there had been no decision on it. The point would have been material if it had been raised, because the lease was to subsist only so long as the mortgage subsisted. If the defendant had pleaded and had proved to the court that the mortgage had come to an end, then the plaintiff's claim would have failed, but he is not allowed to raise a question of fact in second appeal on which there were no pleadings, on which there was no issue and to which no evidence was directed. The case must be decided on the assumption, right or wrong, that the mortgage still subsists and that Bhuttu Mal is the owner of the equity of redemption which was purchased in his name. This being so, the lease must still subsist, and, whether the defendant be or be not the ex-proprietary tenant of the land, he is liable as *thekadar* to his lessor. In this view we must allow the appeal.

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set aside the decree of the lower appellate court and restore that of the court of first instance. The plaintiff will have his costs in all courts. The court of first instance granted the plaintiff a decree for what it has called "usual interest." This interest will run from the date of the suit up to the date of realization, and at the rate of 6 per cent. per annum simple.

Appeal decreed.

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Before Mr. Justice Piggott and Mr. Justice Walsh.

COLLECTOR OF MORADABAD (PLAINTIFF) v. MAQBUL-UL-RAHMAN AND OTHERS (DEFENDANTS).*

Act No. XVI of 1908 (Indian Registration Act), sections 32, 33, 71, 73, 75, 87 and 88—Mortgage-deed—Registration—Presentation—Authority to present document for registration on behalf of executant—Distinction between presentation under Part VI and under Part XII of the Act.

A mortgage-deed was executed on the 20th of November, 1911. Before, however, the deed could be registered, the mortgagee fell ill. On the 3rd of February, 1912, the mortgagee executed in favour of a pleader, a power of attorney of the kind referred to in section 32 of the Indian Registration Act, 1908. This was duly authenticated by the sub-registrar, and the document was presented for registration by the appointee on the 5th of February, 1912. On the 8th of February the mortgagee died. The mortgagor failed to appear before the sub-registrar and admit execution, and the sub-registrar refused to register the deed. An application was next presented to the Registrar under section 73 of the Act by the widow of the mortgagee in the capacity of guardian of the mortgagee's two minor sons, and on the 28th of June, 1912, the Registrar made an order under section 75(1) of the Act directing that the mortgage-deed should be registered. Meanwhile the estate of the minors had been taken under the superintendence of the Court of Wards, and the Collector, as Manager on behalf of the Court of Wards, on the 23rd of July, 1912, sent the mortgage-deed by a messenger to the sub-registrar, with a copy of the Registrar's order mentioned above and an official letter requesting that the document might be registered, which was accordingly done. On suit having been brought on the mortgage, some of the defendants raised an objection that the mortgage-deed in suit was not validly registered. *Held* that the document was properly registered. No valid objection could be sustained as to its presentation, either on the 5th of February, 1912, when it was presented by the pleader acting under his power of attorney given by the mortgagee, or on the 23rd of July, 1912, when it was sent by the Collector to the sub-registrar. The Collector was not bound to present the document in person, and that being so, it was immaterial what means he took to bring it before the sub-registrar.

*First Appeal No. 189 of 1916, from a decree of Ram Chandar Saksena, Additional Subordinate Judge of Moradabad, dated the 29th of January,

That officer was perfectly justified in presuming the authenticity of the Collector's official letter and in taking action accordingly.

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THIS was a plaintiff's appeal in a suit for sale on a mortgage. The question upon which the suit had been dismissed, and the only question raised by the appeal was whether in the circumstances of the case the deed which was the basis of the suit had been validly registered. The facts concerned with the registration of the document are fully stated in the earlier portion of the judgment of PIGGOTT, J.

Mr. A. E. Ryves, for the appellant.

Dr. S. M. Sulaiman, Dr. Surendra Nath Sen and Munshi Gulzari Lal, for the respondents.

PIGGOTT, J. :—This was a suit on a mortgage, dated the 20th of November, 1911. The persons impleaded are the mortgagor and certain subsequent transferees. The mortgage was in favour of one Sahu Prasadi Lal. The evidence shows that before registration of the document had been effected the mortgagee fell ill. It seems a fair matter of inference that the mortgagor endeavoured to take advantage of this fact to defeat the registration of the document. On the 3rd of February, 1912, a special power of attorney of the kind spoken of in section 33 of the Registration Act (No. XVI of 1908), was registered at the office of the Sub-Registrar of Moradabad, whereby the mortgagee, Sahu Prasadi Lal, purported to authorize a pleader named Pandit Nanak Chand to present the mortgage of the 20th of November, 1911, for registration on his behalf. Accordingly, on the 5th of February, 1912, within the period prescribed by law, the mortgage-deed in suit was presented for registration by the said Pandit Nanak Chand, purporting to act under the authority of the special power of attorney of the 3rd of February, 1912. A question has been raised as to the validity of this presentation, and it is just as well to dispose of it at once. The learned Subordinate Judge who tried this suit seems to have thought that, whatever the facts may have been, the plaintiff had been remiss in the matter of producing satisfactory evidence, and that the Court had before it no evidence from which it was entitled to infer that Pandit Nanak Chand did hold a valid power of attorney under the provisions of section 33 aforesaid, authorizing him to present

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this document for registration. I think the decision of the court below on this point is clearly wrong. The document in suit was presented for registration at the office of the Sub-Registrar of Moradabad, the very same office in which the special power of attorney had been registered two days previously. In his endorsement on the deed in suit the Sub-Registrar certifies its presentation by Pandit Nanak Chand under a special power of attorney duly authenticated in his office. That certificate is evidence under the Registration Act of the truth of the facts therein stated. There is no reason whatever for presuming that it is in any way an incorrect statement of the facts. What has been contended before us is that the special power of attorney referred to in section 33 of the Registration Act requires, not merely to be authenticated by the Sub-Registrar, but to be executed before him. The argument is that the certificate above referred to does not specify that the document in question had been executed before the Sub-Registrar. Moreover, it is suggested that, on the evidence as to the illness of Sahu Prasadi Lal, it is fairly certain that he did not appear personally before the Sub-Registrar on the 3rd of February, 1912. Had he been able to appear in person at the Sub-Registrar's office on that date, he would presumably have presented the mortgage of the 20th of November, 1911, himself. This argument, moreover, overlooks the proviso to section 33 of Act XVI of 1908. We may take it from the evidence that Sahu Prasadi Lal was suffering from bodily infirmity at the time. Indeed the argument addressed to us on behalf of the respondents on this point assumes that Sahu Prasadi Lal was in fact unable by reason of bodily infirmity to attend in person at the Sub-Registrar's office. It was, therefore, open to the Sub-Registrar to attest the special power of attorney without requiring the personal attendance of the executant at his office, provided only that he satisfied himself that it had been voluntarily executed by the person purporting to be the principal. We have it from his certificate that the special power of attorney was not merely registered in his office but was duly authenticated by him. In this state of the evidence we are entitled to assume that the Sub-Registrar acted in the proper and lawful exercise of his powers under the proviso to section 33 aforesaid. I think,

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therefore, there can be no doubt that the original presentation of the document in suit for registration on the 5th of February, 1912, was a proper and valid presentation under section 32 of Act XVI of 1908. The mortgagee Sahu Prasadi Lal died on the 8th of February, 1912, a few days after the presentation of the document before the Sub-Registrar. The mortgagor, the executant of the said document, failed to appear before the Sub-Registrar to admit execution of the same. As I have already suggested, I see no reason to doubt that he was purposely keeping out of the way. The Sub-Registrar had no option but to treat the non-appearance of the executant as a denial of execution and to refuse registration on that ground. We know that he did so. This refusal gave rise to a right on the part of any person claiming under such document, or the representative of any such person, to apply to the Registrar to establish his right to have the document registered. We know that such an application was in fact made to the Registrar of Moradabad. It has been made a grievance on the part of the respondents in this Court that the evidence on the record does not show with certainty by whom this application was made. We have been informed that the application was made on behalf of the mother of the two minor sons of Sahu Prasadi Lal, acting as their natural guardian. It does not seem, however, in any way incumbent upon us to call for specific evidence on this point. We know that the Registrar had before him an application on which he proceeded to take action under the appropriate section of the Registration Act. He was satisfied that he had before him a valid application by, or on behalf of, a person entitled to make the same. I do not see that we are called upon to inquire into the precise nature of that application, especially in the absence of any specific plea that it was made by the particular person not authorized to make it. The proceedings before the Registrar resulted in an order by him, under the first clause of section 75 of Act XVI of 1908, whereby he ordered the document to be registered. In the meantime the estate of the minor sons of Sahu Prasadi Lal had been taken under the management of the Court of Wards, and the Collector of Moradabad, in his official capacity as Manager of the Court of Wards, became charged with looking after the interests of the minors in this matter. The Registrar's order for the registration of the

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document was dated the 28th of June, 1912. Within the prescribed period of 30 days, that is to say, on the 23rd of July, 1912, the Collector sent the document in suit to the Sub-Registrar with an official letter, enclosing also a certified copy of the order of the District Registrar. The Sub-Registrar on receipt of this communication, took cognizance of the same as a presentation of the document, within the meaning of section 75, clause (2), of the Registration Act, and proceeded to register the document accordingly. The present suit was instituted on the 23rd of November, 1914, the plaintiff being the Collector of Moradabad as Manager of the Court of Wards in charge of the estate of the two minor sons of Sahu Prasadi Lal. The defendants were the original mortgagor, who did not contest the suit, and a number of subsequent transferees. In the written statements filed by some of these men the plea was taken that the document sued upon had not been duly presented for registration within the requirements of the law, that its registration was consequently invalid and that it could not affect the property hypothecated. The court below fixed a number of issues, but as between the plaintiff and the subsequent transferees it has tried out only one issue as to the validity of the registration. Having come to a finding that the registration was invalid, the learned Subordinate Judge has dismissed the plaintiff's claim altogether, holding that, as a claim for a simple money debt against the original mortgagor, the suit would be barred by limitation.

The appeal before us raises simply the question of the validity of the registration. In the earlier portion of this order I have taken occasion to dispose of two points which were incidentally argued. There remains the main substantial point in the appeal, namely, whether the Sub-Registrar of Moradabad was right in treating this document as having been duly presented to him on the 22nd of July, 1912, when he received it under cover of an official letter from the Collector of Moradabad. In dealing with this point I do not propose to refer to the numerous authorities which have been cited before us. The present case is clearly distinguishable on the facts from any of those authorities, in that it turns upon section 75, and not exclusively upon section 32, of the Registration Act. This was not a case in which the registration officers had

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never been lawfully seized of the document at all. There had been, as I have held, a valid presentation of the document in the first instance on the 5th of February, 1912. Moreover, there was in existence a positive order by the District Registrar that the document be registered. The only question, therefore, is whether the procedure adopted in carrying out that order was such as wholly to invalidate the registration which followed, or was at most an irregularity of procedure on the part of the Sub-Registrar of Moradabad covered by section 87 of the Registration Act. The provisions of section 75, clause (2), of the Act are somewhat curiously worded. There is no such categorical imperative as is to be found in section 32, where it is laid down that, subject to certain exceptions, every document to be registered shall be presented by one or other of the persons described in the categories which follow. All that section 75, clause (2), does is to empower the registering officer to register the document, without such complete compliance as would otherwise be required with the provisions of sections 58, 59 and 60 of the Act, provided only it be duly presented to him within 30 days of the making of the Registrar's order. The controversy before us has turned on the expression "duly presented." The Sub-Registrar's duty when he received this document on the 23rd of July, 1912, was no doubt to satisfy himself that it was being presented to him by a person claiming under the document. If the Collector of Moradabad had presented himself in person at the office, the Sub-Registrar would presumably have taken the Collector's word for it that the estate of the minor sons of the deceased mortgagee was now in his charge as Manager of the Court of Wards and that he was entitled to prefer a claim under the document on behalf of the said minors, or he might have satisfied himself on this point by a reference to the notification in the official Gazette. What he had before him was an official letter, on the authority of the Collector of Moradabad, claiming to be in charge of the estate of the minors and to be entitled to present the document for registration. The argument that the Collector's failure to present this application in person is a fatal defect in the registration of the document seems to me open to a *reductio ad absurdum*. Whoever the messenger may have been who carried the document

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in question along with the Collector's letter to the office of the Sub-Registrar of Moradabad, the Collector could have given him formal authority to present the document by the execution of a special power of attorney; that special power of attorney, being an instrument executed by the Collector in his official capacity, could have been registered on the strength of an official letter from the Collector, without his personal attendance at the office, under the provisions of section 88 of the Registration Act. On the principle that the greater includes the less it seems to be asking far less of the Sub-Registrar that he should take cognizance of the Collector's official signature and designation to a letter informing him of the Collector's interest in the document in suit and presenting it for registration, than to ask him to accept a similar letter as proof of the fact that a particular document, as for instance a power of attorney, had been executed by the Collector. Under the circumstances of the case I think we are not straining the law in holding that the presentation of this document made on the 23rd of July, 1912, was a sufficient compliance with the requirements of section 75, clause (2), of the Act. Even if I do not think so I should feel justified in regarding the action of the Sub-Registrar in taking cognizance of certain facts on the strength of an official letter received from the Collector of the district, without requiring the personal attendance of that officer before him, as at most a defect of procedure, curable by provisions of section 87 of the Act. I hold therefore that the finding of the court below that the document in suit is invalid as a mortgage for want of due registration is incorrect and must be reversed. Although certain other issues have been disposed of in the judgment under appeal, this was the main issue decided as between the plaintiff and the subsequent transferees and it was certainly a preliminary issue. As we have reversed the finding of the court below on this point, I think the proper order to pass is that the decree of the court below be set aside and the case returned to that court for retrial and disposal on the merits. We leave the costs of this appeal to be costs in the cause.

WATSON, J.—I agree. I think the case of the respondents is an attempt to apply the *dicks* of the Privy Council to a

situation in respect of which they were certainly not uttered and to which, I think, they are not applicable. I propose to cite authorities only for the purpose of showing the principles which have to be borne in mind and then to attempt to construe these somewhat complicated provisions in order to make them work, if possible, naturally and easily.

Now, first, with regard to the presentation by the pleader on the 5th of February. By the endorsement that presentation purports to have been made under the authority of a special power of attorney duly authenticated in the registration office two days before. I feel a difficulty in applying the terms of section 60, sub-section (2), to that endorsement. The endorsement, it seems to me, is only evidence of the facts mentioned by it after the provisions of the section have been complied with and a certificate has been issued for registration. And, inasmuch as the very question which we have to decide is whether those provisions have been complied with, as provided by section 60, it looks to me somewhat like begging the question to apply section 60, sub-section (2), to this endorsement. There is a further difficulty strongly relied upon in argument by Dr. *Sulaiman* that it is only evidence of the facts mentioned in the endorsement and the endorsement does not, it so happens in this case, mention the fact of the execution of the power of attorney. And therefore, although I agree in the conclusion at which my brother has arrived to be drawn from that endorsement, I do so for somewhat different reasons. I think it is in any event, apart from the provisions of the Act, an instance of the sort of case to which the old maxim of *omnia praesumuntur rite et solemniter esse acta* ought to be applied, and that view seems to me to be supported by a passage in a case under this Act of a similar nature decided in the Privy Council as long ago as 1877. In that case Sir MONTAGUE E. SMITH, delivering the judgment of their Lordships, said:—"If the High Court is to be understood to mean that in all cases where a registered deed is produced, it is open to the party objecting to the deed, to contend that there was an improper registration, that the terms of the Registration Act in some substantial respects have not been complied with, their Lordships think this is too broadly stated. Undoubtedly, it would be a

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most inconvenient rule if it were to be laid down generally, that all courts, upon the production of a deed which has the Registrar's endorsement of due registration, should be called on to inquire, before receiving it in evidence, whether the Registrar had properly performed his duty. Their Lordships think that this rule ought not to be thus broadly laid down. The registration is mainly required for the purpose of giving notoriety to the deed. . . . If the registration could at any time, at whatever distance of time, be opened, parties would never know what to rely upon, or when they would be safe. If the Registrar refuses to register there is at once a remedy by an appeal." Applying that general statement of principle to the endorsement on a deed of the alleged authentication before the Registrar of a power of attorney under which a person presenting the deed for registration purported to act, I think in the absence of either a finding or of evidence to the contrary, and there is a total absence of either in this case, we are entitled to assume that when the Registrar endorsed on the deed the due authentication in his office of the power of attorney he meant that it was a power of attorney which had been properly executed and authenticated before him in accordance with law. And I therefore agree with my brother that the case of the respondents with regard to the presentation of the 5th of February breaks down.

We, therefore, start with this, that the document in question was presented at the Sub-Registrar's office for registration in accordance with the requirements of the law which the Privy Council in a passage which I propose to cite has said "it is the duty of court of India to see carried out." The guiding principle recognized more than once by the Privy Council and reiterated by decisions in this Court is to be found in the head-note to the decision in *Mujib-un-nissa v. Abdur Rahim* (1):—"The power and jurisdiction of the Registrar only arises when he is invoked by a person in direct relation to the document." And the necessity of guarding against opening the door even to trivial breaches of these requirements has been recently enforced by the judgment of their Lordships delivered by Sir JOHN EDGAR in *Jambu Prasad v. Muhammad Aftab Ali Khan* (2):—"It is

the duty of courts of India not to allow, the imperative provisions of the Act to be defeated when, as in this case, it is proved that an agent who presented a document for registration had not been duly authorized in the manner prescribed by the Act to present it." I would only add that a perusal of the judgment of the High Court in that case delivered by GRIFFIN, J., shows that there was positive evidence and a finding of fact negating the strict compliance with the requirements of the Act.

These cases are decisions, as my brother has pointed out, under sections 32, 33 and 34 of the Act. And, as my brother has already pointed out, there is in the provision about presentation in section 75 to which I propose to refer in a moment, an absence of that imperative language which Sir JOHN EDGE refers to in the passage I have quoted. This brings me to the question of the second presentation, namely, of the 23rd of July, by the Collector through a letter, after various incidents, including the death of the mortgagee had occurred, and a proceeding had taken place before the Registrar. The receipt of that letter was carefully endorsed by the Sub-Registrar on the deed on the same day, and the second point which we have to decide, and it is really the great difficulty in the case, is whether there was a due presentation of that deed in accordance with section 75. I have come to the conclusion that there was, very largely for this reason. I think part VI and part XII of the Act deal with totally different circumstances and contemplate a totally different situation, and that the fallacy underlying the respondent's argument is an attempt to introduce into part XII considerations bearing upon interpretation which are really only applicable to part VI. The contrast between the two parts is really significant. Part VI is a collection of sections, and they are those on which the decisions of High Courts and Privy Council have been mainly given, dealing solely with "presenting documents for registration." Part XII is also self-contained and deals with a situation created by what is called "refusal to register." We have to deal with a case of refusal to register, and of another kind of presentation in consequence of the proceedings rendered necessary by such refusal. Section 71, (2), says that "no registering officer shall accept for registration

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a document endorsed with a refusal unless and until, under the provisions hereinafter contained, the document is directed to be registered. Section 72, so far as there is anything before us in the case at present, does not apply, but I refer to it for one rather important fact. The word "presented" occurs in it, namely, an appeal may be heard from the order of the Sub-Registrar if presented to the Registrar within 30 days. It could hardly be contended that that presentation must be of the strict personal character which is obviously intended by part VI of the Act and therefore we find in the part of the Act which we have to construe that the word "presented" is used in what I may call a more elastic sense. Section 73 deals with the right of the party who desires to secure registration where the Sub-Registrar refuses on the ground of the denial of execution. That right is to apply to the Registrar to establish his right to have the document registered. Section 74 provides for an inquiry before the Registrar, as the result of such application, into (a) the execution, (b) the compliance with the requirements of the law. As regards "presenting" it clearly refers to such presentation as is dealt with by part VI "so as to entitle the document to registration." And in connection with such inquiry section 75(4) enables the Registrar to summon and enforce the attendance of witnesses, to compel them to give evidence as if he were a Civil Court, and to deal with costs which are made recoverable as if they had been awarded in a suit under the Code of Civil Procedure. In my view that proceeding is a judicial proceeding and was intended by the Legislature to be a judicial proceeding, the ordinary penalty for failure in which was visited on the unsuccessful party in the way such penalties are. And to my mind, therefore, the questions of the due execution, the due authorization of the person presenting, and the due presentation, when such an inquiry has taken place, are decided and disposed of for the purpose of the immediate question of registration or non-registration in a final order. The result of the Registrar's order, if in the affirmative, is to establish the right of the person to have the document registered and to entitle the document to registration, and the form of his order is an order that it shall be registered. To my mind, though I feel difficulty and hesitation about it, it would be to attribute

totally superfluous particularity to the Legislature if one were to hold that these provisions in section 75 superimpose upon that solemn proceeding and final decision, a duty upon the person who desires merely to carry out the order of the Registrar, of performing the strict formalities which are necessary and have been held by the Privy Council to be necessary before the registration by the Registrar has taken place. To my mind what happens after the Registrar's order is pure machinery. Any form of presentation, if it is supported by an application, which takes place on behalf of the presenter and is noted on the order in his favour, is sufficient. And even if it were not, I agree with my brother that section 87 covers the case. I, therefore, agree that this decision cannot stand.

I want to add one word with regard to the way in which the case has been dealt with. As I have often said it is in the interests of the courts themselves, and what is far more important, in the interests of the litigant, that in a case of this description where the evidence has in fact been taken and both sides have done all that they are able or likely to be able to do before the trial court, and the court, when it sits down to review the whole case and write its judgment, finds that there is some technical point which in its opinion enables it to dismiss the case, it should go on to dispose of all of the issues which have been dealt with in evidence and argued at the bar before it. It is just as easy, and there is no better time than when the hearing of the case is fresh in the recollection of the court. Nobody is infallible, and in a difficult case of this kind it is not impossible that the appellate court will take a different view of the law and therefore it is of the highest importance that the courts, with such points before them, should go on to complete the whole case and come to a conclusion upon the merits.

The real question in this case is whether there is anything to show that these two infant children whom the Court of Wards represents as plaintiffs are to be deprived of the fruits of the contract entered into by their father. And here are we, sitting in this Court, with all the evidence material to that point already given on both sides in the court below, and if findings had been arrived at by the court below, fully equipped for disposing of the

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case upon the merits, compelled to send the case back for a re-hearing, probably before another judge, two years at least after the original hearing of the suit. It is suggested that, even after that has taken place and it has come to this Court again, there may still be an appeal to the Privy Council on the main question of registration. All these proceedings have a tendency to prolong to an unspeakable extent the decision of a comparatively trivial dispute and to accumulate the expenditure of costs out of all proportion to the issues involved. Of course where there is a real preliminary point, it is a totally different matter. No doubt it is necessary sometimes to decide as a preliminary matter whether the court is competent to hear a case at all. But when every thing has been done to enable the trial court to dispose of a case, I think it is a great misfortune, and it happens a great deal too often, that a judge gets rid of it by disposing of some technicality raised by one of the parties leaving the merits wholly untouched. I agree with my brother that this is a preliminary point and that the case must go back.

BY THE COURT.—We set aside the decree of the court below and remand the case to that court under order XII, rule 23, of the Code of Civil Procedure for re-trial and disposal on the merits. We leave the costs of this appeal to be costs in the cause.

Appeal decreed and cause remanded.

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*Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir
 Pramadā Charan Banerji.*

SHANKAR LAL (PLAINTIFF) v. RAM BABU (DEFENDANT).
*Partnership—Death of one partner leaving a minor son—Suit by surviving
 partner against minor for rendition of accounts—Procedure*

One of two partners in a specific business, who was alleged to have been the managing partner, died, leaving him surviving a minor son. The other partner sued the minor, as his father's representative, for rendition of accounts and for payment of what might be found due to him (the plaintiff).

Held that the suit was maintainable; but the proper procedure was for the court to direct both sides to produce their accounts and thereafter to pass a decree for whatever sum might appear to be due from one party to the other.

* Second Appeal No. 770 of 1916 from a decree of D. R. Lyle, District Judge of Agra, dated the 9th of February, 1916, confirming a decree of P. K. Nay, Munsif of Agra, dated the 12th of March, 1915.

THE facts of this case were as follows :—

Puran Chand, defendant's father, took a contract of the grass farm for one season from the Cantonment Magistrate at Agra in July, 1912, and made the plaintiff his partner. Plaintiff's case was that he deposited with Puran Chand his share of the capital, that most of the sums realized remained with Puran Chand, who used to keep the accounts. Puran Chand having died, plaintiff instituted the present suit against the defendant, Puran Chand's minor son, for settlement and rendition of accounts. In reply the defendant urged that he could not be called upon to render accounts and that as a matter of fact the plaintiff himself had realized a much larger sum than was due to him. The courts below dismissed the suit holding that the defendant, being merely the personal representative of a deceased partner, was not the accounting party. The plaintiff appealed.

Pandit *Kailas Nath Katju* (with him Pandit *Shiam Krishna Dar*), for the appellant.

Munshi *Mangal Prasad Bhargava*, for the respondent.

RICHARDS, C. J., and BANERJI, J.:—We think that both the courts below have taken an extremely narrow and technical view of this case. It appears that one Puran Chand had a lease of the grass farm at Agra. He took into partnership the plaintiff. They were to provide the capital between them and to share in the profits. Puran Chand died. The plaintiff then instituted the present suit, alleging that he had received certain money, and that Puran Chand and after his death his minor son received further money in connection with the joint enterprise. He alleged that there was a much larger sum received by Puran Chand's estate than he had received and that there would be a balance payable to him upon taking accounts. He accordingly asked that the accounts should be taken. The courts below have dismissed the suit, holding that it was not maintainable and that the minor could not be liable to render accounts. It seems to us (assuming the plaintiff's allegation to be true), that it would have been a very right and proper thing that the minor should have been ordered to render an account of the moneys received by Puran Chand or after his death by his estate in respect of the enterprise. It is said that he (the plaintiff)

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ought to have claimed a definite sum. It is only after he knew what had been received by the other side and what expenses had been incurred that he would be in a position to name the sum that ought to be paid to him. The learned District Judge says that it will be most unfair that the plaintiff should escape rendering an account whilst the other side was ordered to render accounts. We cannot understand what there was to prevent the courts below, if it was objected on behalf of the minor defendant that it was not admitted that the plaintiff had only received the sum he alleged, to have directed that he also should furnish an account of what he had received and what he had expended. We think that the personal representative of a deceased partner is bound to give an account of what has been received on behalf of the partnership. Of course the personal representative will only be liable for the person he represents, to the extent of the assets he receives. What we think the court below ought to have done was to have passed the preliminary decree directing that each party should furnish an account of what has been received and what has been spent. These accounts after they have been filed can be accepted or objected to in the ordinary way and dealt with by the court. It may be objected that the minor is unable to give the accounts. The mere fact that he is personally unable to give the accounts will not absolve him from the obligation of getting the accounts prepared by the persons who were conversant with what took place and what money was received and spent and who were acting either for Puran Chand during his life or for the minor and the estate of Puran Chand after his death. We allow the appeal, set aside the decrees of both the courts below and remand the case to the court of first instance, through the lower appellate court, with directions to re-admit the suit in its original number and to proceed to deal with the same having regard to what we have said above. The court can deal with the case as near as possible on the lines of the provisions of order XX, rule 15, of the Code of Civil Procedure making a preliminary decree for an account. Costs here and heretofore will be costs in the cause.

Appeal allowed and cause remanded.

Before Mr. Justice Piggott and Mr. Justice Walsh.
 MIR DAD KHAN AND ANOTHER (DEFENDANTS) v. RAMZAN KHAN
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Act (Local) No. II of 1901 (Agra Tenancy Act), sections 10 and 20—Attempt to evade the provisions of the law as to the alienation of sir land—Mortgage and relinquishment of ex-proprietary rights executed by two separate documents of even date.

Certain zamindars, appurtenant to whose proprietary share was a considerable area of *sir* land, executed on the same day in favour of creditors to whom they were indebted to the extent of Rs. 9,000, two documents. By one of these the proprietors covenanted to mortgage with possession 30 bighas of land forming part of their *sir* lands. They recited that they had put the mortgagees in actual possession of the land in question, surrendering all their rights in the *sir* and *khudkasht*. They further covenanted that if the mortgagees should fail to obtain possession, or if the mortgagors should after all not give up the *sir* land from their own cultivation, or should set up any claim to hold it as ex-proprietary tenants, then the mortgagees should be entitled to sue for their mortgage money with heavy interest and to enforce the same by sale of the proprietary rights of the mortgagors, not merely in the 30 bighas of *sir* land, but in a total area of 63 bighas and odd belonging to the mortgagors. The consideration of this document was stated at a sum of Rs. 8,000. A further attempt was made to safeguard the mortgagees by the insertion of a covenant that they should, further, be entitled at any time to sue for the principal of their mortgage debt and to bring to sale the proprietary rights of the mortgagors in this area of 30 bighas, which was formally hypothecated as security for the debt. The other document was a deed of relinquishment, by which the mortgagors under the former deed purported to surrender or to relinquish in favour of the mortgagees in return for a consideration of Rs. 1,000, their rights as ex-proprietary tenants in the 30 bighas of *sir* land in question.

Held, that the whole transaction was but a single one effected under cover of two deeds, and was nothing more than an attempt to evade by an ingenious device the provisions of sections 10 and 20 of the Agra Tenancy Act, 1901.

Moti Chand v. Ikrām-ullah Khan (1) and *Dipān Rai v. Ram Khelawān* (2) followed. *Lekhraj v. Purshadi* (3) discussed.

THE facts of this case are fully set forth in the judgment of PIGGOTT, J.

Babu Panna Lal, for the appellants.

Mr. M. L. Agarwala and Babu Girdhari Lal Agarwala, for the respondents.

* First Appeal No. 149 of 1916, from a decree of Shams-ud-din Khan, First Additional Subordinate Judge of Aligarh, dated the 26th of January, 1916

(1) (1916) I. L. R., 39 All., 173. (2) (1910) I. L. R., 32 All., 383.

(3) (1909) 6 A. L. J., 713.

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Piggott, J.—The suit out of which this first appeal arises is based upon the following state of facts :—

Mir Dad Khan and others were the owners of proprietary rights in a certain mahal. Appurtenant to these proprietary rights was a considerable area of land of which these zamindars were in possession either as *sir* or *khudkasht*. With reference to the *khudkasht* land it is sufficient to say that it was land which had been held by the proprietors in their own cultivation for the full statutory period and which had, therefore, acquired the essential character of *sir* land, so far as section 10 of the Local Tenancy Act, No. II of 1901, is concerned. For purposes of brevity, therefore, it will be convenient hereafter to speak of the *sir* lands of Mir Dad Khan and others. Now these proprietors were indebted, and the evidence on the record shows that there was a decree out against them for a sum of Rs. 9,000, held by Thakur Das and others. The proprietors endeavoured to come to terms with these creditors, and I do not think that there can be any doubt as to the nature of the arrangement effected. The creditors were willing to accept a usufructuary mortgage for Rs. 9,000, that is to say, for a sum sufficient to pay off their decree, provided that the land mortgaged, being 30 bighas of the *sir* land of the debtors, should pass into their actual cultivating possession. In endeavouring to effect such a transaction the parties concerned had to get round the difficulties placed in their way by Statute, that is to say, by the Local Tenancy Act, and particularly by sections 10 and 20 of that Act. It so happens that the law on this point has been recently settled by the highest possible authority in the case of *Moti Chand v. Ikram-ullah Khan* (1). So far as I am concerned, I think I am entitled to say that there is nothing in the propositions of law there laid down other than I have been consistently asserting for some years past, or other than were given effect to by Mr. Justice TUDBALL and myself in the case of *Dipan Rai v. Ram Khelawan* (2). Their Lordships of the Privy Council, in deciding the case before them, by no means overlooked the provisions of

his proprietor. What they point out is that this right of surrender cannot be permitted to be used in such a manner as to defeat the provisions of the law by which ex-proprietary tenancies are created. They point out that the policy of Act No. II of 1901, is to secure and preserve to a proprietor whose proprietary rights in a mahal, or in any portion of it, are transferred, otherwise than by gift or exchange between co-sharers in the mahal, a right of occupancy in his *sir* lands. Such right of occupancy is secured and preserved to the proprietor, who becomes by a transfer the ex-proprietary tenant, whether he wishes the right to be secured and preserved to him or not, and notwithstanding any agreement to the contrary between him and the transferee. It is further pointed out that the courts must not allow the policy of the Act to be defeated by any ingenious devices, arrangements or agreements between a vendor and a vendee for the relinquishment by the vendor of his land. They go on to point out, more particularly, that devices to compel such a surrender by the inclusion in the deed of transfer of provisions amounting to a penalty against the transferor, in the event of his failing to relinquish the ex-proprietary tenancy, must also be regarded as devices or arrangements for defeating the policy of the Act. Cases in which attempts have been made, more or less openly, to evade the provisions of the law on the subject of ex-proprietary tenancies do from time to time come before the courts, and we have to notice more particularly the decision of a Bench of this Court in *Lekhraj v. Parshadi* (1), in which it would appear that a transaction which one might at least suspect of having been of this nature was given effect to by the court. According to their Lordships of the Privy Council I take the true test to be this:—If a covenant to relinquish the *sir* lands is part of the transaction of sale or of mortgage, then the agreement to surrender will be void and unenforceable, no matter what ingenious devices may be employed to give colour to it. If the court is satisfied that there was first of all a transfer by way of sale or mortgage and that the transferee, having obtained the status of an ex-proprietary tenant, with full knowledge of that fact and of the rights preserved to him by the Statute, deliberately

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chooses, as a separate transaction, to relinquish his ex-proprietary tenancy into the hands of the new proprietor, or of the mortgagee in possession, then the law cannot go further in the way of protecting a reckless and imprudent man against the consequences of his own acts.

In the present case what we have to consider is the nature of the agreement actually entered into between Thakur Das and his fellow creditors on the one hand and Mir Dad Khan and his fellow zamindars on the other. Two documents were executed on one and the same date, namely, the 19th of June, 1913. By one of these documents the proprietors covenanted to mortgage with possession 30 bighas of land forming part of their *sir* lands. They declared themselves to have put the mortgagees in actual possession of the land in question, surrendering all their rights in the *sir* and *khudkash*. They further covenanted that, if the mortgagees should fail to obtain possession, or if the mortgagors should after all not give up the *sir* from their own cultivation, or should set up any claim to hold it as ex-proprietary tenants, then the mortgagees should be entitled to sue for their mortgage money with heavy interest and to enforce the same by sale of the proprietary rights of the mortgagors, not merely in the 30 bighas of land already referred to, but in a total area of 63 bighas and odd belonging to the mortgagors. The consideration for this document was stated at a sum of Rs. 8,000. A further attempt was made to safeguard the mortgagees, in any event, against a possible refusal on the part of the mortgagors to carry out the contract in its entirety. The mortgagees did not content themselves with taking a usufructuary mortgage pure and simple. They inserted a covenant that, in spite of their right to obtain possession of the 30 bighas of land and to enjoy the usufruct in lieu of interest, they should nevertheless be entitled at any time to sue for the principal of their mortgage-debt and to bring to sale the proprietary rights of the mortgagors in this area of 30 bighas, which were formally hypothecated as security for the debt. The other document of the same date was a deed of relinquishment, by which the mortgagors under the former deed purported to surrender, or to relinquish in favour of the mortgagees, in return for a consideration of Rs. 1,000, their

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rights as ex-proprietary tenants in the 30 bighas of *sir* land in question. Whatever doubt there may be in particular cases as to the precise nature of the transaction entered into, it seems to me that there is no room for doubt in the present case. The total sum of money which Mir Dad Khan and his fellow zamindars owed to Thakur Das and others was Rs. 9,000, and this was distributed between the two deeds, the mortgage deed and the deed of relinquishment. Moreover, the mortgage-deed itself contained, not merely an express stipulation to put the mortgagees in actual cultivating possession of the *sir* lands, but a penalty clause binding the mortgagors not to assert their rights as ex-proprietary tenants. The transaction, therefore, was one single transaction effected under cover of two deeds. It was a determined attempt to evade "by ingenious devices and arrangements," as their Lordships of the Privy Council have put it, the provisions of sections 10 and 20 of Act No. II of 1901. It is quite immaterial that, according to the terms of the two documents, the surrender purports to have been actually effected. In any such attempt to get round the provisions of the law the transferee is certain to insist upon a statement that he has actually been put in possession and that the surrender which he desires has actually been effected. I must note, however, that the mortgage-deed in question is not a usufructuary mortgage pure and simple, to a certain extent it is a combination of a simple and a usufructuary mortgage, and is therefore what the courts in India commonly speak of as an anomalous mortgage. We are principally concerned in the present case with the effect of this document as a usufructuary mortgage. On the principles laid down by their Lordships of the Privy Council all the stipulations about the surrender of ex-proprietary rights and about the transfer to the mortgagees of actual cultivating possession over this area of 30 bighas are void and unenforceable. The penalty clause goes along with the rest, being strictly analogous to the sort of device spoken of by their Lordships of the Privy Council at the close of the judgment already referred to, whereby the vendor covenants to make himself liable to a suit for breach of contract on his failing or refusing to carry out the stipulated relinquishment of his ex-proprietary rights. Such a stipulation would, in the

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opinion of their Lordships, be void and unenforceable. I can see nothing in the stipulation in the deed in suit by which the mortgagors bound themselves, in the event of their setting up any claim to possession as ex-proprietary tenants, to submit to a decree for sale against their proprietary rights in an area of 63 bighas and odd, to distinguish it from a stipulation that they should be liable to a suit for damages, or to any other kind of penalty, in the event of their failure to relinquish. In the view of the case which I take I am by no means disposed to differ from such decisions as that which we have been referred to, viz., I. L. R., 39 All., p. 539, where a mortgage affecting some property which was transferable, along with other property which was by law non-transferable, was allowed to be enforced against the former of the two properties. I do not say for a moment that the mortgage-deed in suit, regarded as a usufructuary mortgage, was altogether void and of no effect. What it gave the mortgagees was the right affirmed by Mr. Justice TUDBALL and myself in *Dipan Rai v. Ram Khelawan* (1), namely, the right to proprietary possession in respect of this area of 30 bighas and the right to have rent assessed thereon upon the mortgagors, as ex-proprietary tenants, and to receive and enjoy the said rent in lieu of interest on their money. This was no doubt less than the mortgagees wanted and hoped to secure by the transaction, but it was the legal effect of the transaction actually entered into, in view of the provisions of section 10 of the Tenancy Act, by which the ex-proprietary tenure was preserved to the former proprietor, "whether he wished it or not," as the Privy Council have said. We have been asked, however, to consider further the anomalous nature of this mortgage and the legal effect of hypothecation of the proprietary rights in this area of 30 bighas as security for repayment of the principal loan. For reasons which I shall have to state presently, I do not think that any decision on this point is necessary to the determination of this appeal. My own opinion undoubtedly is that the original mortgagees, Thakur Das and others, could have enforced this stipulation. They could have taken up the position that the contract of mortgage which they had entered into was

(1) (1910) I. L. R., 32 All., 383,

a usufructuary mortgage combined with a simple mortgage: that they had made a mistake in attempting to evade the statute law by the terms of their usufructuary mortgage, and that they, therefore, claimed to fall back upon the document as a simple mortgage and to ask for a decree on that basis. It may, however, be noticed at the same time that this remedy would have been worth extremely little to the mortgagees. If the proprietary rights of Mir Dad Khan and his fellow zamindars in this area of 30 bighas had been brought to sale on a decree enforcing the hypothecation of the same for repayment of the loan of Rs. 8,000, the sale itself would at once have given rise in favour of the mortgagors to this very ex-proprietary tenure which it was the object of the deed in suit to get round. The purchaser at auction, whether Thakur Das, or another, would have had to be content with the rent assessed by the Collector on this ex-proprietary tenure as representing to him the usufruct of the property purchased. This right the original mortgagees could enjoy as mortgagees under the usufructuary part of the mortgage, and it would not have made much difference to them to have endeavoured to work out the same result by enforcing the hypothecation lien, if that were limited (as it must be limited apart from the penalty clause) to the proprietary rights in the area of 30 bighas.

The case now before us is not between the mortgagors and the original mortgagees. The plaintiffs, who are the respondents to this appeal, were co-sharers in the same mahal, and the transfer of the proprietary rights of Mir Dad Khan and others by way of usufructuary mortgage gave rise to a right of pre-emption on their part. This right they claimed to enforce and they brought a suit accordingly. That suit was finally settled by a compromise and the compromise decree, which is dated the 16th of June, 1914, gives these plaintiffs as pre-emptors the right of possession as mortgagees over the property pre-empted, that is to say, over the 30 bighas of *sir* land in suit. It gives them nothing more: even if what I have called the penalty clause of the original contract of mortgage were enforceable by the original mortgagees, which I believe it was not, there is nothing in this decree to make it enforceable by the pre-emptors.

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Still less does this decree give the plaintiffs any right, under the mortgage-deed of the 19th of June, 1913, to bring the property to sale under the hypothecation effected in the earlier part of the said deed. I doubt whether an alienation by way of simple mortgage would have given rise to any right of pre-emption. The presumption is that persons possessing the right of pre-emption would have had to wait until the property was brought to sale in enforcement of the hypothecation lien, and then to have asserted any rights of pre-emption which they might claim. However this may be, the pre-emption decree actually passed does not transfer to these plaintiffs any rights as simple mortgagees in respect of the land in suit.

In the suit as brought the plaintiffs claim the full benefit of the terms of the mortgage of the 19th of June, 1913. They say that they are entitled to actual possession over the area of 30 bighas in question or, failing this, that they are entitled to recover the mortgage debt of Rs. 8,000, with interest at 2 per cent. per mensem under the penalty clause of the mortgage-deed, by sale of the area of 63 bighas and odd referred to in that clause. The learned Subordinate Judge who tried the case was not an officer with any revenue experience, nor had he before him at the time of his decision the clear pronouncement of their Lordships of the Privy Council to which reference has already been made. It is, therefore, no imputation against him to say that, in the very brief judgment pronounced by him, he has not shown much appreciation of the difficulties of the case. He has definitely held that the plaintiffs were not entitled to possession as mortgagees over the land in suit, but he has enforced in their favour the penalty clause in the original contract of mortgage, which they were most certainly not entitled to have the benefit of. The decree as passed is for recovery of the principal of Rs. 8,000 with arrears of interest and costs, by sale of the 63 bighas and odd of land already referred to. From the operation of this decree, however, a certain share has been excluded, on the ground that one of the former proprietors was a minor and that his certificated guardian joined in this mortgage on his behalf without having duly obtained the sanction of the District Judge. We have a petition of cross-appeal before us

challenging the decision of the trial court on this point; but in view of the decision which we have arrived at on the main question it seems unnecessary for us to go into it. If the appeal of the defendants succeeds the cross-objection must obviously fail.

Now, as regards the appeal of the defendants, I have already given abundant reasons why in my opinion the decree as passed cannot stand. In the very able and ingenious argument addressed to us by Mr. *M. L. Agarwala* on behalf of the respondents, although he very properly declined to give up any part of his client's case, it is doing him no injustice to say that he could not make out much of a case for affirming the decree of the court below as it stands. What he really pressed upon us was the right of his clients to one or other of two different reliefs. He contended that, in any event, his clients should be given the benefit of what I have called the hypothecation clause in the mortgage-deed of the 19th of June, 1913, and the proprietary rights of the mortgagors in the 30 bighas of land in question brought to sale, at least in satisfaction of the principal of the mortgage debt. In reply to the suggestion that the right to enforce this hypothecation clause had not passed to his clients under the pre-emption decree, Mr. *Agarwala* contended with much keenness that no plea to this effect had been taken in the written statement of any of the defendants. It seems a fair rejoinder to this to say that neither was any claim to this effect set up in the plaint. The claim in the plaint was for cultivating possession over the land in suit, by ejectment of Mir Dad Khan and his fellow mortgagors, or in the alternative, for enforcement of the penalty clause by the passing of a decree for sale in respect of the entire area of 63 bighas and odd. I feel quite satisfied that, whatever might have been the rights of Thakur Das and others in respect of the hypothecation of the area of 30 bighas, those rights did not pass to the present plaintiffs under the pre-emption decree and that therefore this relief is not open to them.

The other contention¹ pressed upon us by Mr. *Agarwala* has caused me more difficulty. It is based not merely on the documentary evidence already referred to but upon certain evidence

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as to transactions which followed the execution of the mortgage-deed in suit. Broadly speaking, Mr. *Agarwala's* contention is this :—That the mortgagors, Mir Dad Khan, and others, whatever may or may not have been their rights under the deed in suit, did carry out their part of the contract by actually surrendering to the mortgagees, Thakur Das and others, the ex-proprietary tenancy which the Statute created in their favour. The argument is that the original mortgagees thus obtained actual cultivating possession of the land in question and enjoyed the same for the period of about a year that by this possession the ex-proprietary tenure became finally extinguished and can no longer be set up against the plaintiffs pre-emptors. I admit the contention to be a highly ingenious one and the question which it raises seems to me of some difficulty. In the first place, however, I think that on the evidence on this record Mr. *Agarwala* is asking too much of us in the way of findings of fact in his favour. The patwari of the village was not put into the witness box nor were any of the original mortgagees called. We know from the plaint that Mir Dad Khan and the other mortgagors were in actual cultivating possession of the 30 bighas of land when the suit was instituted on the 5th of July, 1915, and the plaint certainly does not explain how or when they recovered that possession, if they did in fact surrender their ex-proprietary tenancy into the hands of the original mortgagees. One of the plaintiffs was put into the witness box and deposed that the mortgagees, Thakur Das and others, had entered into actual possession of the land. He said he himself failed to get actual possession because Mir Dad Khan forcibly cultivated it. He was cross-examined on this point in a manner which clearly showed that the defendants did not admit the facts stated by him to be correct, but the only evidence by which he sought to support himself was the production of certain records of the Revenue Courts showing the mutation proceedings which followed the execution of the mortgage-deed in suit. Now the execution of that deed required in any event to be taken due notice of in the village records. There had to be some mutation of names in respect of it and the natural tendency of the Revenue Court, unless their attention was specially called to the matter, would

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be to effect formal mutation of names in accordance with the terms of the deed. What I notice more particularly is that the Tahsildar, on whom the duty of making the necessary preliminary inquiries lay, when reporting the matter for the orders of the Assistant Collector in-charge of the Sub-division, contented himself with mentioning that there had been a surrender of the ex-proprietary holding, keeping back the very important fact, which he should certainly have mentioned, that that surrender purported to have been made and attested by a deed of even date with the usufructuary mortgage itself, that is to say, at a time when it was at least doubtful whether the mortgagees were entitled to receive any such surrender, and under circumstances strongly suggestive on the face of them of an attempt to evade the law. The Assistant Collector appears to have passed his order for mutation of names, without further consideration or inquiry, on the strength of the Tahsildar's report. I am not satisfied therefore that this evidence proves that there was an effective surrender of the land in suit into the hands of Thakur Das, much less that the possession of Thakur Das and his fellow mortgagees lasted for the entire period of one year, or for anything like that period. It is of course possible that, as between the original mortgagees and the original mortgagors, the contract would have been carried out according to its terms, if the plaintiffs had not interfered with their suit for pre-emption. The fact remains that, by the time when the present plaintiffs tried to obtain the benefit of their pre-emption decree, they found the original mortgagors in effective possession of the land in suit and claiming to be exactly what the law says they are, namely ex-proprietary tenants of the same. Looking at the matter in its broadest aspect, I would say that the rights which these plaintiffs took under their pre-emption decree in respect of the mortgage deed in suit, regarded as a usufructuary mortgage, were simply the rights which the law would permit the original mortgagees themselves to take under the same, namely, the right to proprietary possession subject to an ex-proprietary tenancy in favour of the original mortgagors. This is the position taken up by the defendants in this suit, and I think that position is correct in law and that the plaintiffs are not entitled, either to

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the relief which has been decreed to them by the court below or to any of the reliefs which have been claimed on their behalf in the alternative. In this view of the case I would allow the appeal, set aside the decision of the court below and dismiss the plaintiffs' suit with costs, and similarly dismiss with costs the cross-objection filed by the plaintiffs respondents.

WALSH, J.—I agree. I think this is a colourable transaction. The two deeds were in fact an attempted sale of the ex-proprietary rights. If so, the case is clearly covered by the decision in *Dipan Rai v. Ram Khelawan* (1) and also by the observations of the Privy Council reported in I. L. R., 39 All., p. 173, where Sir JOHN EDGE, in delivering judgment, affirmed the principle laid down by the High Court that the transaction was not a lawful one, whether it was regarded as an attempted sale of the ex-proprietary rights or an agreement to relinquish those rights when they should arise, and pointed out that the policy of Act No. II of 1901, was that the right of occupancy should be secured and preserved to the proprietor who becomes by a transfer the ex-proprietor, whether he wishes it to be secured and preserved to him or not, and notwithstanding any agreement to the contrary between himself and the transferee.

The transactions in these two deeds are in substance one transaction which took place on the same day. They are in form inseparable, but I think that the same principle would apply even if they were in form separable. I apply the reasoning which was applied by the House of Lords in *Maas v. Pepper* (2). The law being in England that no mortgage of movable chattels can be entered into where the chattels remain in the possession of the grantor without a registered document, there had been a sale of furniture to an alleged purchaser, who by a contemporaneous document re-let them on a hire agreement for the original price at which he had bought them, *plus* an addition to that sum which the court regarded as merely interest under another name, the agreement giving to the hirer the right to become the owner by re-purchase if he paid the instalments under the agreement. Now those two documents were entirely independent in form: None the less, the House of Lords held that the trial court had

(1) (1910) I. L. R., 32 All., 383. (2) (1905) A. C., 105, H. L.

been right in going behind the form and deciding what was in substance the real transaction, and pointed out that the sale was really a colourable sale to disguise what was in substance a loan. I think by the same reasoning this was a colourable relinquishment to disguise what was in fact a sale. No doubt an exproprietary tenant can, as such, surrender his rights by a proper relinquishment. Nobody can put the point, I think, better than it has been put by Mr. *M. L. Agarwala* at page 69 of his book on the Tenancy Act in this sentence:—"It comes to this, that though a proprietor can, in fact give up his exproprietary rights when they accrue, by not availing himself of them, he cannot bind himself by an express stipulation to that effect in a deed of transfer of the property or the like."

I think that is what these documents purported to do. I agree with what my brother has said about the decision in *Lekhraj v. Parshadi* (1). Unless the facts of that case are distinguishable from this case by something which does not appear in the judgment, I am bound to say, having regard to the fact reported that the two transactions were contemporaneous in date, I should have found difficulty in holding that the alleged relinquishment in that case was not also a colourable transaction. To that extent I am unable to agree with the decision.

By THE COURT:—We allow the appeal, set aside the decision of the court below and dismiss the plaintiff's suit with costs. We also dismiss with costs the cross-objection filed by the plaintiffs respondents.

Appeal allowed. Cross-appeal dismissed.

Before Mr Justice Tudball and Mr Justice Abdul Raoof.
DEB, PRASAD AND ANOTHER (PLAINTIFFS) v. BADRI PRASAD
(DEFENDANT)*

Act No IX of 1908 (Indian Limitation Act), section 28 ; schedule I, article 144—Right recurring at uncertain intervals—Right to take wood from trees when fallen or cut—Adverse possession

The father of the plaintiffs in 1867 obtained leave from the Collector to plant trees alongside a road on land belonging to Government. He expressed

* Second Appeal No. 712 of 1916, from a decree of G. C. Badhwar, Additional Judge of Farrukhabad, dated the 26th of January, 1916, confirming a decree of Ali Ausat, Officiating Subordinate Judge of Farrukhabad, dated the 19th of June, 1915.

(1) (1909) 6 A. L. J., 719 ; 2 Indian Cases, 400.

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his willingness to do so at his own expense and to tend them; and the only right he asked for was to get the fallen dry wood from the trees. Subsequently the village passed out of the possession of the plaintiffs' father, and on two occasions in 1900 and in 1910, the defendant, who had purchased the village, got the proceeds of the sale of such wood. The plaintiffs on both occasions asserted their claim to wood or the price thereon, but were unsuccessful. Within six years from the date of the last sale they brought a suit for a declaration of their right to get the dry wood by virtue of the agreement of 1867. The defendant pleaded adverse possession. *Held*, that the right being one which could only be exercised on uncertain occasions and not a right recurring at fixed periods, and as there had been disputes as to the right between the parties on two previous occasions, it could not be said that the defendant had acquired a title by adverse possession.

Quære, whether section 28 of the Indian Limitation Act, 1908, applies at all to a case like this.

THE facts of this case were shortly as follows:—

Madan Gopal, the father of the plaintiffs, was a mortgagee in possession of a village called Runni Chursai. There was a *kachcha* road leading from Runni Chursai to mauza Patia. In 1867, Madan Gopal made an application to the Collector of Farrukhabad asking for permission to plant a row of trees on either side of the *kachcha* road for the comfort and convenience of travellers. He represented further that he would never sell the trees, would watch and tend them at his own expense and appropriate for his own use dry fallen wood of the trees. The Collector gave the permission asked for, and Madan Gopal planted the trees. In 1883, Madan Gopal transferred his zamindari in mauza Runni Chursai, but did not transfer his rights in the trees planted on the roadside. Subsequently, the zamindari came into the possession of the defendant by purchase in 1887. The sale-deed in his favour included the row of trees abovementioned. The defendant thereupon began to assert his rights to the row of trees and on some occasions he appropriated the fruits to his own use. In 1900, the district board had the branches of the trees lopped off. Madan Gopal and the defendant laid claim to the price realized on the sale of the loppings. After inquiry, the district board paid the price to the defendant. In 1901, the defendant sued some persons for damages for wrongful plucking of the fruits. The suit was dismissed by the District Judge on the ground that the defendant had no right whatever in the trees. In 1910, some dry wood

was sold by the district board and again rival claims were made by the defendant and the plaintiffs (as the heirs of Madan Gopal). The district board again recognized the rights of Badri Prasad and paid over the money to him. The plaintiffs instituted this suit for a declaration of their rights to the dry and fallen wood of the trees. The defendant pleaded that the trees were appurtenant to his zamindari and in the alternative that he had been in adverse proprietary possession of the trees for over twelve years. The courts below dismissed the suit. The lower appellate court found that the tree stood on Government land and were in possession of the same. It nevertheless held, that time at the latest had begun to run against the plaintiffs since the dispute in 1900, and the suit was, therefore, barred by time. The plaintiffs appealed.

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Pandit *Kailas Nath Katju*, for the appellants:—

There can be no adverse possession of a right such as the one claimed by the plaintiffs. A plea of adverse possession pre-supposes two things, firstly, that the plaintiff was entitled to immediate possession of the property in dispute, and secondly that the defendant is in such possession. In the present case neither supposition holds good. Neither party is entitled to possession of the property. Government is in possession as of right. The right reserved by Madan Gopal was to the fallen wood and would only become operative whenever any wood happened to fall. Such a right is incapable of adverse possession by anybody. The party relying upon a plea of adverse possession has to make out continuous uninterrupted possession in himself for 12 years. Here wood happened to fall twice in 12 years, once in 1900 and again in 1910. The wrongful appropriation by the defendant of such wood on those two occasions would not deprive the plaintiffs of their right for ever. Every fresh invasion of a right gives a cause of action for a suit for declaration until the right itself is extinguished by operation of section 28 of the Limitation Act; *Ilahi Bakhsh v. Harnam Singh* (1), *Allah Jilai v. Umrao Husain* (2). Section 28 is expressly confined to suits for possession of property and does not apply to claims of any other kind. It was impossible for the plaintiffs to

(1) Weekly Notes, 1908, p. 215. (2) (1914) I. L. R., 36 All., 492.

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claim possession of this intangible right. Rights of this description are valuable and have been recognized by the courts; *Bishan v. Naipal* (1), *Barley v. Stephens* (2). In order to prevent all further disputes this was a fit case for the granting of the declaration prayed for.

Dr. *Surendra Nath Sen*, for the respondent :—

The findings show that the defendant has been exercising all acts of possession which were open to him having regard to the nature of the property. He had been appropriating and selling the produce of the trees ever since 1889 and taking the fallen wood, whenever there was any, and had all along been asserting his rights. It is true that the Government was in possession of the trees, but it was open to the defendant to acquire by adverse possession all the rights which the plaintiffs had in them and much more over and above that, just as it is open to one to acquire by adverse possession the limited rights of a tenant. It is not in every case that actual physical and continuous possession should be proved to make out a title by adverse possession; *Lord Advocate v. Young* (3). The right of Madan Gopal has been constantly denied during the last 25 years, and it is too late now to seek a declaration. The granting of a declaration is within the discretion of the court, and such discretion should not be exercised in support of such a vague and shadowy right as claimed by the plaintiff. Further, the plaintiffs are the sons of Madan Gopal. There is nothing to show that the original grant in favour of Madan Gopal enures for the benefit of his successors. There is no formal grant in existence; and the application made by Madan Gopal in 1867 does not show that it was anything more than a personal licence given to Madan Gopal alone. To entitle themselves to a declaration the plaintiffs must prove clearly that they have the right they claim. The Government was also a necessary party.

Pandit *Kailas Nath Katju*, in reply :—

The case has been fought throughout on the footing that the right reserved to Madan Gopal was a heritable and transferable right. In fact the defendant himself had in the first instance

(1) *Weekly Notes*, 1885, p. 299. (2) (1862) 12 C. B., N. S., 91.

(3) (1887) 12 A. C., 544.

claimed as a transferee from Madan Gopal. The defendant should not be allowed to raise a new point in second appeal. Having regard to the very nature of the right the presumption was that it must have been regarded as heritable. The Government had never denied the existence of the right and was wholly indifferent as to the merits of the rival claimants.

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TUDBALL and RAOOF, JJ. :—This is a plaintiff's second appeal. The facts of the case are as follows. In the year 1867 the father of the two plaintiffs, one Madan Gopal, was the mortgagee of certain zamindari rights in the village of Runni Chursai. There was a public unmetalled road which ran from the village lands of this village up to the *pucca* road some short distance away. This public road belonged to the State and still belongs to it. In 1867 there were no trees standing on it and Madan Gopal applied to the Collector of the district in writing, pointing out this fact and that he wished to plant trees upon the public road for the benefit of the public; that he would tend and look after them, and that he would only claim the wood that might fall from the trees as his own. He would have no right to sell the trees. The Collector agreed to this and Madan Gopal planted those trees along the public road. It is quite clear, as the land vested in the state, the ownership of the trees did not vest in Madan Gopal, but as the Collector had agreed to the condition that he was to take the fallen wood, he no doubt continued to take it so long as he remained in the village. In the years 1885 and 1887 there were certain transfers of the zamindari shares in the village and Madan Gopal lost all interest in the zamindari of mauza Runni Chursai. In 1887 Badri Prasad became a co sharer in the village by a sale deed under which his transferor purported to sell to him, not only the zamindari share, but also the trees which had been planted upon the road, as being his. In 1890 and again in 1892, Badri Prasad sold the fruit of these trees to various persons. In 1899 he had some civil litigation in regard to the fruit of the trees against a third party. In 1901 the chairman of the district board, under whose control the road is, sold the fruit to a third party. Badri Prasad objected, and the Collector cancelled his sale. In 1900 the trees were lopped and the loppings were sold by the district board. Badri Prasad claimed title to

that even if the defendant had no real title in the beginning, still he and his predecessors had been in proprietary and adverse possession and enjoyment of the trees since the year 1881, and therefore the suit was barred by limitation, the defendant having acquired title by prescription. The court of first instance found that the trees were planted on the land of the road; that the land was the property of the state; that the trees had nothing to do with the zamindari of the defendant; that the plaintiffs' claim, however, was barred by twelve years adverse possession and that they were not entitled to the declaration, the defendant having held adverse possession since the year 1885. In the course of the suit on the 16th of June, 1915, the plaintiffs' pleader, vide *rukhar* 65A, clearly stated to the court that his client only claimed a right to tend the trees and to take the fallen wood; that he claimed no greater right than this, that he had nothing to do with the fruit, etc. The plaintiffs appealed. The court below has treated the case as if it was clearly a suit in respect to the ownership of the trees and the possession thereof. It has said that the questions for determination in the appeal are:—Whether the plaintiffs have been in possession within twelve years of the suit or whether the defendant has been in adverse proprietary possession for more than twelve years; also whether the suit is barred by limitation. In the preamble of its judgment the lower appellate court has stated the facts as to the planting of the trees. In the body of its judgment it has stated as follows:—"No trees nor any rights in them were transferred to the defendant, nor are the trees standing on village lands. Under the contract with the Collector the plaintiffs' father reserved to himself only the right to take the fallen wood of the trees, but nothing else. No rights in the trees could be transferred by the planter of the trees. The plaintiffs have no zamindari left in the village and they do not reside in mauza Runni Chursai. They brought this suit for a declaration that they were the owners of these trees and had the right to take the fallen wood and also for an injunction that the defendant should not interfere with the exercise of their right." The appellate court held that the defendant had been in possession (presumably of the trees, though it does not say so clearly) for more than twelve years and has

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dismissed the appeal and decreed. The plaintiff came here in second appeal. It is clearly admitted before us that the only right which the plaintiffs claim and seek to vindicate is the right to tend the trees and to take any wood that may fall; that they have no concern whatsoever with the fruit, and that they have no other right whatsoever in the trees. It is concluded by one *on behalf of both parties* that these trees, planted in the manner stated above, and standing on public property belonging to the State, do not belong to either party; that in so far as they are in anyone's possession, they are in possession of the Government. It is urged on behalf of the plaintiffs that there has been no adverse possession and cannot be any such adverse possession in a case like this such as is contemplated by section 23 of the Limitation Act. On behalf of the respondent, however, it is urged that in so far as any right could be exercised by the parties, it has been regularly exercised by the defendant and his predecessors-in-title for well over twelve years. We think it should be made quite clear that the only right which is in dispute before us is the right to take the fallen wood. Under the application of 1867 that was the only right which was given to Madan Gopal. The plaintiffs, therefore, are not and cannot be concerned with the fruit and if the district board or the Collector has in the past allowed Badri Prasad to take the fruit, that is no concern of the plaintiffs, for they themselves have no right to it admittedly. As to the fallen wood, there are only two years in which there has been any dispute whatsoever. One was in the year 1900 and the other was in the year 1910. In both these years there were disputes and in both years the Collector gave the value of the fallen wood to Badri Prasad. It is impossible, therefore, in our opinion, to say that these two occurrences show that the defendant has been in adverse proprietary possession of the right which the plaintiffs now claim before us. There is no question of proprietary right in the trees. No doubt the parties litigated in respect thereto in the courts below, but one fact is clear, and that is that neither party is the owner of the trees and that the sole right in dispute before us is the right to take the fallen wood. We have considerable doubt whether section 23 of the Limitation Act has any application whatsoever to this case, but even assuming that it has, it is impossible to hold that by reason of the two disputes

in 1900 and 1910, the defendant has established continuous adverse possession of this right as against the plaintiffs. The right is one which clearly can only be exercised on occasion, that is when a y wood may fall or be cut from the trees. It does not occur every year or at stated times. It is urged that the plaintiffs' suit should have been brought at least within six years of the dispute of 1900, but we do not think the plaintiffs were bound to come into court on the occasion of that invasion of their right. It was again invaded in the year 1910, and they have come into court within six years of that invasion to establish their right to take the fallen wood. We therefore cannot agree with the court below that the suit is barred by limitation in any way at all. It has, however, been urged before us that the plaintiffs have no right whatsoever even to the wood, under the petition and order of the year 1867 and that this Court, therefore, should grant them no declaration whatsoever. This is a point which has not been raised before in the course of this litigation. It amounts to asserting that Madan Gopal's right under the transaction of 1867 was purely a personal right which could be transferred neither by inheritance nor by sale, but this has not been the position which the parties have taken up in the courts below. Badri Prasad's claim was actually based on a transfer in his own favour and the litigation having been fought out on the assumption that the right was a transferable and heritable one, we can see no necessity whatsoever to allow this point to be raised at this stage of the case. The district board or the Secretary of State for India are neither of them parties to the present litigation and the decree therein will not affect them in any way. It will be time enough to decide this question when either of these two parties is involved in litigation with the plaintiffs or the defendant. This appeal is decided on the assumption that the right of Madan Gopal to take the fallen wood is a transferable right which descends to his heirs. The result, therefore, of our findings is this, that the plaintiffs are entitled to a declaration that they have a right to take the fallen wood of the trees in dispute which were planted by Madan Gopal on the basis of his application of 1867, and that the defendant has no right to interfere with the plaintiffs taking of that wood. There is no necessity whatsoever for any injunction, as the exercise of this right

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claimed to be next heir under the ordinary Hindu Law. Sheo Singh claimed to exclude her either under the provisions of Act I of 1869, section 22, or, if that Act did not govern the succession then under the special rule of inheritance provided in the sanad granted in 1861 by the Government to Girwar Singh, the predecessor in title of Balbhadar Singh. That suit was eventually dismissed by a judgment of the Privy Council on the 18th of May, 1905, in the appeal of *Sheo Singh v Raghubans Kunwar* (1), and on receipt of the Order in Council made in pursuance of the judgment, the Court of the Judicial Commissioner remitted the case for inquiry and report by the Subordinate Judge, who fixed the issues (1) what villages did Balbhadar Singh acquire (a) from money transactions, (b) by money obtained in his three marriages, (c) by profits of a sugar manufactory, and (d) by money obtained from one Duddhu Sahiba? (2) If Balbhadar Singh acquired any villages from other sources than the taluqa, were they treated as appurtenances to the taluqa, and how the fact affects the case? and (3) If Balbhadar Singh acquired any villages from the income of the taluqa, do they not form part of the accretion or appurtenance to the taluqa?

The Subordinate Judge recorded that out of 167 villages, 107 in the district of Kheri and one village in the district of Sitapur, in all 108 villages, had been admitted on behalf of the plaintiff to belong to taluqa Mahewa, and that therefore there remained only 59 villages to be dealt with: of these he held that 31 had been shown to be non-taluqdari villages, but the other 28 he held to be taluqdari villages.

Objections were taken on behalf of both parties and lodged in the Judicial Commissioner's Court, and were considered by a Bench of that Court (Mr. R. SCOTT, *Judicial Commissioner*, and Mr. L. G. EVANS, *Additional Judicial Commissioner*) who varied the decree of the first Court as to some of the villages. The result was that the claim of the plaintiff was dismissed to all the villages claimed by her except the 31 villages entered in the decree of the Judicial Commissioner's Court, dated the 4th of March, 1907, which was drawn up in due course.

(1) (1905) I. L. R., 27 All., 634; L. R., 32 I. A., 203.

The circumstances out of which appeal 78 of 1911 arose are the same as in the other two appeals 87 and 88 of 1910. The properties to which it related were (1) villages summarily settled with Gajraj Singh, an ancestor of Balbhaddar Singh the deceased taluqdar, (2) villages said to have been acquired by Balbhaddar Singh, (3) house property, (4) movables.

Of these (3) and (4) which had been omitted from the former inquiry by the Subordinate Judge, were by an order of the Court of the Judicial Commissioner of Oudh, dated the 28th February, 1908, remitted for inquiry to him, and he settled issues as follows :—(1) “whether Thomsonganj house at Sita-pur and the property in list (4) were acquired by Balbhaddar Singh from sources other than the income of the taluqa, or from the income of the Estate”? (2) “In either case under what category would the above properties fall, i. e., under taluqdari property, its accretions and appurtenances, or otherwise”? (3) “whether Kaisar Bagh house in Lucknow was granted to Girwar Singh as taluqdar, or was it built by Balbhaddar Singh upon the site acquired by him”? and (4) “Under what category in either case would it fall”?

The Subordinate Judge made his report on the 20th of November, 1908. He found that there was no evidence that the property included in issue (1) was acquired by Balbhaddar Singh from sources other than the income of the taluqa; but he found that all the said property was neither within taluqa Mahewa as constituted in 1861, nor accretions or properties appurtenant to the said taluqa within the meaning of the Order in Council, dated the 13th of July, 1905. He found the Kaisar Bagh house (issue 3) in Lucknow was taluqdari property, as it was granted to Girwar Singh as taluqdar in exchange for another house taken by the Government.

Objections were lodged by both parties to his report, and final judgment was delivered by the Judicial Commissioner Mr. E. M. DesC. CHAMIER on the 21st of January, 1909. That Court affirmed the decision of the Subordinate Judge with regard to the property included in issue (1), and reversed it as to the Kaisar Bagh house in Lucknow (3), and made a decree accordingly.

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On this appeal—

DeGruyther, K. C., and *S. A. Kyffin*, for Rajindra Bahadur Singh, contended that the properties in dispute were within taluqa Mahewa, or were accretions to that taluqa within the meaning of the Order in Council of the 13th of July, 1905. The Court of the Judicial Commissioner had rightly dismissed the suit in regard to 152 of the villages claimed, and should also have dismissed the suit in regard to the other 31 villages, which were also within Mahewa as constituted in 1869, or were accretions, or properties appurtenant to Mahewa within the Order in Council. The property devolved on the appellant by a family custom of descent. The presumption arising under section 10 of the Oudh Estates Act (I of 1869), where the taluqdar's name has been entered in list 2 prepared under that Act, was that there was a family custom of descent to a single heir, and property acquired was subject to the same custom and incorporated with the family property. Reference was made to *Ishri Singh v. Baldeo Singh* (1), *Janki Prasad Singh v. Dwarka Prasad Singh* (2), and *Murtaza Husain Khan v. Muhammad Yasin Ali Khan* (3). If the property descended to a single heir the appellant was clearly entitled to succeed. The custom of descent to a single heir was recognized and perpetuated by the sanad of 1861. The villages afterwards acquired were purchased out of the income of the taluqa, and there was therefore a presumption that the taluqdar's intention was that they should become accretions to, and incorporated with, the estate. Reference was made to *Gonda Kooer v. Kooer Oodey Singh* (4), *Isri Dut v. Hansbutti Koerain* (5); *Sheelochun Singh v. Sahab Singh* (6); *Sarabjit Partap Bahadur Sahi v. Indarjit Partap Bahadur Sahi* (7); and *Lal Bahadur v. Kanhaiya Lal* (8). The villages purchased with the income of the taluqa were accretions to it within the meaning and intention of the judgment of the Board

- (1) (1884) I. L. R., 10 Calc., 792, L. R., 11 I. A., 135. (5) (1888) I. L. R., 10 Calc., 324; L. R., 10 I. A., 150.
(2) (1913) I. L. R., 35 All., 391 (398), L. R., 40 I. A., 170 (181). (6) (1887) I. L. R., 14 Calc., 387; L. R., 14 I. A., 63.
(3) (1916) I. L. R., 38 All., 552; L. R., 43 I. A., 269. (7) (1904) I. L. R., 27 All., 203.
(4) (1874) 14 B. L. R., 159. (8) (1907) I. L. R., 29 All., 244; L. R., 34 I. A., 65.

in the former case *Sheo Singh v. Raghubans Kunwar* (1). The same was the case with the movable property. The house in dispute was intended by Government to be part of the taluqdari estate.

A. M. Dunne, K. C., and *B. Dube*, for the representatives of Rani Raghubans Kunwar, contended that the Judicial Commissioner's court had rightly interpreted the Order in Council of the 13th of July, 1905, and had rightly decided that the predecessor of the present respondents was entitled to possession of both the houses, and of the movable property in dispute, and also to the 31 villages mentioned in the list; but that that Court had erred in holding that the properties and villages must be held to have been included in a former part of taluqa Mahewa as constituted at the date of the sanad of 1861. Rani Raghubans had established her right and title to these villages. No form of descent of the property was specified by the Board at the former hearing of the case in 1905, for the facts as to the property now in dispute were not before it at that time. There was nothing to show that the taluqdar's intention was to incorporate the purchased villages in the taluqa. He had at any rate no power to create a form of descent which was not in accordance with the ordinary Hindu law. There was in the suit no suggestion of a family custom of primogeniture; it only alleged a custom to exclude females, which was held by both Courts in India not to have been established on the facts. The taluqdar therefore had no power, even if he had the intention, to make the non-taluqdari property descend by primogeniture as provided in the sanad. The decisions of the Board cited as to the non-taluqdari property of a taluqdar whose name is entered in list 2 do not therefore uphold the appellant's contention. The cases referred to of property purchased by Hindu widows in possession with the income of the family estate, and of members of a joint Hindu family incorporating self-acquired property with the joint family property are not applicable, as under Hindu law the descent of self-acquired property is different from that of joint family property. There was no sanad produced with regard to the house, and

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there could be no presumption that its terms were the same as the sanad under which the taluqi was constituted. The Crown Grants Act (XV of 1895), section 2, and the Oudh Estates Act (I of 1869) section 7, were referred to.

1918, *February* 25th.—The judgment of their Lordships was delivered by Sir JOHN EDGE.—

The suit in which these consolidated appeals have arisen came on appeal before the Board in 1905. The Board which heard the appeal finally decided several important questions which were in dispute between the parties, but did not finally dispose of some other questions which related to portions of the property which were in dispute in the suit, and in respect of the questions which were not then finally decided advised His Majesty that these questions should be remanded to the Court of the Judicial Commissioner of Oudh with power to that Court to remit the case to the Court of the Subordinate Judge for inquiry. The judgment of the Board is reported in 32 Indian Appeals, 203 (1). The Court of the Judicial Commissioner made on the 4th of March, 1907, a decree which dealt with some of the questions in dispute, and on the 21st of January, 1909, a further decree which dealt with the remaining questions in dispute, and from these decrees these consolidated appeals have been brought. The original parties to the suit are dead, and to understand the position of the parties to these consolidated appeals it is advisable to state, so far as it is material for that purpose, the pedigree of the family to which they belong, so far as it has been proved or admitted in this litigation. The members of the family are Hindus.

Gajraj Singh, died childless in January, 1860	Girwar Singh, died without issue of his body on 2nd January, 1865	Dania Singh, survived his brother Girwar Singh.
Balbhaddar Singh, adopted by his uncle Girwar Singh whom he succeeded, and died childless on 12th December, 1898.	= Rani Raghubans Kunwar, original plaintiff, now dead.	Sheo Singh, original defendant, now dead.
Rajindra Bahadur Singh, eldest son, party to the appeal of 1905. Died in 1912.	= Rani Baji Kunwar, living.	Mahindra Bahadur Singh, Narindra Bahadur Singh, Shiva Indra Bahadur Singh, brought upon the record in place of Rani Raghubans Kunwar on her death.

(1) 1905. Sheo Singh v. Raghubans Kunwar, I. L. R., 27 All., 646.

The property to which the suit related was property, movable and immovable, of which Balbhaddar Singh died possessed on the 12th of December, 1898. On his death his widow Rani Raghubans Kunwar and his brother Sheo Singh each claimed adversely to the other all the property of which Balbhaddar Singh had died possessed, the Court of Revenue made an order for the mutation of names in favour of Sheo Singh, and he obtained possession of all the property, movable and immovable. Rani Raghubans Kunwar, on the 6th of February, 1900, brought this suit against Sheo Singh for possession of all the movable and immovable property. She alleged that Balbhaddar Singh had been adopted by his uncle Girwar Singh, and that Girwar Singh had by his will devised all his property to Balbhaddar Singh, who had enjoyed it until his death. Her suit was resisted by Sheo Singh, who alleged that all the property claimed by her appertained to taluqa Mahewa and was impartible; that by a custom in the family females were excluded from the inheritance; that the succession to the taluqa was governed by section 22 of the Oudh Estates Act (I of 1869), under which he claimed that a brother was entitled in priority to the widow; and he denied that Balbhaddar Singh had been adopted by Girwar Singh. Sheo Singh relied upon a sanad of the 19th of October, 1859, by which the Government had granted taluqa Mahewa to Gajraj Singh and his heirs without other limitation of the line of inheritance. At some period of the litigation a copy of a sanad, which was granted by the Government to Girwar Singh in 1861, was produced, and the Board in 1905 held that the copy was admissible in evidence, and that Girwar Singh had in fact surrendered to the Government the sanad which had been granted to Gajraj Singh in 1859 and the estate which had been granted by it, and in lieu of that sanad had accepted the sanad of 1861. The sanad of 1861 said expressly :—

"It is another condition of this grant that in the event of your dying intestate, or of any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture."

The Courts in India had held that the sanad of 1861 could not in law operate to substitute the line of descent prescribed by it, for the line of descent prescribed by the earlier sanad of 1859, and having found that Balbhaddar Singh had been adopted

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by Girwar Singh and had succeeded to taluqa Mahewa under the will of Girwar Singh, and that the alleged custom excluding females from the inheritance had not been proved, gave Rani Raghubans Kunwar a decree for possession. That alleged custom excluding females from inheritance was the only custom of the family which Sheo Singh attempted to prove.

In the appeal which came before the Board in 1905 from the decree of the Court of the Judicial Commissioner it was contended on behalf of Rani Raghubans Kunwar that Girwar Singh was not competent to surrender to the Government the sanad of 1859; that the Government, having granted by the sanad of 1859 the estate to Gajraj Singh and his heirs, had nothing left to grant to Girwar Singh in 1861, and, further, that the Government had no power to create by the grant of 1861 an estate descending by any rule of inheritance that was contrary to the ordinary law, which, as the family were Hindus, was the Hindu law. The Board, however, held that Girwar Singh, being entitled by inheritance to everything that had passed to Gajraj Singh under the sanad of 1859, was competent to surrender the sanad of 1859 and to accept instead of it the sanad of 1861, and had surrendered the sanad of 1859 and the estate which had passed under it, and that the Government was competent to grant the sanad of 1861. As to the contention that the Government had no power to grant to a Hindu, as it did by the sanad of 1861, an estate which should descend on an intestacy to the nearest male heir according to the rule of primogeniture their Lordships said:—"Whatever force such a contention might otherwise have had appears to their Lordships to be removed by the Act to which their attention was called, 'The Crown Grants Act, 1895' (Act XV of 1895). That Act, recites, amongst other things, that, doubts have arisen as to the power of the Crown to impose limitations and restrictions upon grants and other transfers made by it or under its authority, and it is expedient to remove such doubts. And section 3 enacts that—

All provisions, restrictions, conditions, and limitations ever contained

When the appeal was being argued before the Board in 1905 the arguments addressed to their Lordships related only to the right to the possession of taluqa Mahewa on the death of Balbhaddar Singh, and it appears to have been overlooked by counsel during the arguments that the appeal also related to other property which was alleged to have been acquired by Balbhaddar Singh, and which had not formed part of the property granted by the sanad of 1861. Before the judgment of the Board was delivered in 1905 the attention of their Lordships was drawn by counsel to the fact that the appeal also related to such other property. In their judgment of 1905 their Lordships consequently said:—"The present appeal relates mainly to taluqa Mahewa, and the argument before their Lordships dealt only with it. The principle adopted in this judgment only applies to that taluqa, including, of course, any property that may have accreted to it since the date of the sanad under which it is held. It has been pointed out by counsel that the suit out of which the appeal arises related also to property said to have been acquired apart from the taluqa. It seems clear that their Lordships have not materials before them to enable them to define what property (if any) other than the original contents of the taluqa now passes as part of it." Their Lordships held that taluqa Mahewa, as constituted at the date of the sanad of 1861, with accretions (if any) or properties (if any) appurtenant to the taluqa, had, on the death of Balbhaddar Singh, passed in accordance with the limitations of that sanad to Sheo Singh as the next male heir according to the rule of primogeniture, and humbly advised His Majesty to make—

"a declaration that the taluqa Mahewa, as constituted at the date of the sanad, with accretions (if any) or properties (if any) appurtenant to the taluqa, has passed to the appellant, and that as to any other property of the deceased the decrees of the courts below are not affected, and to order that it be left to the court of the Judicial Commissioner, if it be found that there is real controversy on the point, either itself to determine what property falls under one category and what under the other, or to remit the case for inquiry to the Court of the Subordinate Judge, and to order that, so far as may be necessary to give effect to the first part of the foregoing declaration, the decrees of the courts below ought to be discharged and the suit dismissed."

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That declaration was made by the Order in Council, and the court of the Judicial Commissioner remitted the case for inquiry to the court of the Subordinate Judge.

The court of the Subordinate Judge made two reports, one relating to the villages in dispute, and the other to a house at Sitapur, a house at Lucknow, and movable property of which Balbhaddar Singh had died possessed. Objections which were taken to each of those reports came at different dates before the court of the Judicial Commissioner, and from the decrees of that court made upon those reports these consolidated appeals have been brought.

Some of the learned Judges of the court of the Judicial Commissioner misunderstood what their Lordships meant in 1905 by the terms "accretions" and "properties appurtenant" to taluqa Mahewa. Their Lordships obviously did not mean to limit accretions to accretions to land which had gradually and imperceptibly by the action of water gone to the owner of the adjacent soil. No accretion of that nature had apparently been suggested by the parties to the suit. What was suggested was that Balbhaddar Singh had acquired property by purchase and had added it to the estate which had been granted by the sanad of 1861 to Girwar Singh. The facts were not before their Lordships in 1905 which would have enabled them to decide whether any lands had accreted to taluqa Mahewa as it was constituted at the date of that sanad. The Crown has in British India power to grant or to transfer lands, and by its grant, or on the transfer, to limit in any way it pleases the descent of such lands. But a subject has no right to impose upon lands or other property any limitation of descent which is at variance with the ordinary law of descent of property applicable in his case. Sir Edward Chamier, then Mr. Chamier, Judicial Commissioner of Oudh, in his judgment on some objections taken to one of the reports of the court of the Subordinate Judge, correctly stated the law in this respect as to the power of a subject, thus :—

"I take it that is settled law that a subject cannot make his property descendible in a manner not recognized by the ordinary law, and that he cannot subject it to a rule of descent such as is contained in the primogeniture sanad granted to Girwar Singh. If this is so, it appears to me to follow that Balbhaddar Singh could not by express declaration, still less by mere

volition, whether actual or presumed, subject property acquired by him to the rule of succession entered in the primogeniture sanad granted to Girwar Singh."

With that statement as to the law their Lordships agree. It follows that in ascertaining what were the lands claimed by Rani Raghubans Kunwar in respect of which her suit was not dismissed in 1905, it must be ascertained what were the lands of which Balbhaddar Singh died possessed which were acquired by him and did not form part of taluqa Mahewa as it was constituted at the date of the sanad of 1861, and were not lands acquired by him from the Government in exchange for lands which were included in that sanad. The Government had power to give to Balbhaddar Singh in exchange for sanad lands other lands which had not been granted to Girwar Singh in 1861, and the lands so acquired by him in exchange would be subject to the rule of descent prescribed in the sanad of 1861.

By the sanad of 1861 the Government granted to Girwar Singh "the full proprietary right, title, and possession of taluqa Mahewa, consisting of the villages as per list attached to the Kaboolyut you have executed," subject to the payment of rent and the other conditions in the sanad mentioned. The estate which was granted to Girwar Singh in 1861 was the same estate which had been granted to Gajraj Singh in 1859 and had been surrendered to the Government by Girwar Singh. Unfortunately neither the Kaboolyut which was executed by Girwar Singh in 1861 nor the Kaboolyut which was executed by Gajraj Singh in 1859 has been found, but the lands granted in 1861 were lands of which the Government was then in a position to grant "the full proprietary right and title" to Girwar Singh.

When the case was remitted for inquiry to the court of the Subordinate Judge, that court reported that of the 166 villages for which Rani Raghubans Kunwar had obtained her decree, which was the subject of the appeal in 1905, there was no controversy as to 108 of them: it was admitted that the 108 villages were taluqdari villages, that is, that they were villages which were included in the sanad of 1861. As to the remaining 58 villages the Subordinate Judge reported that Sheo Singh was entitled to 27 specified villages, and that Rani Raghubans Kunwar was entitled to 31 villages, which also were specified in

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the report. Rani Raghubans Kunwar filed objections to the findings of the Subordinate Judge as to 19 of the 27 villages which the Subordinate Judge had reported to be taluqdari villages, and on the other side objections were filed as to the findings of the Subordinate Judge as to the 31 villages which he had reported to be non-taluqdari villages, that is, villages not covered by the sanad of 1861.

On the consideration of the report the court of the Judicial Commissioner allowed the objections of Rani Raghubans Kunwar to the findings of the Subordinate Judge as to Chak Sarkhanpur, Chak Simri, and one-half of Hasanpur, and held that they were non-taluqdari; and, on the other hand, allowed the objections to the findings of the Subordinate Judge as to Sarkhanpur Marhuna, Puraina, and Patti Bhupatpur, and held that they were taluqdari villages, and overruled all the other objections, and made the decree of the 4th of March, 1907, which is one of the decrees now under appeal.

Their Lordships will now deal with the appeals in which the title to the villages is disputed before them. They will consider only those cases in which it appears from the record that the objections to the report of the Subordinate Judge which had been filed were persisted in by one or other of the parties in the court of the Judicial Commissioner. It must be taken that the findings of the Subordinate Judge were correct in all those cases in which the objections to his findings were not supported in the court of the Judicial Commissioner.

The villages Parai, Unchgaon, and Khandwa Mitmau, which were non-taluqdari villages, and were not included in the sanad of 1861, are villages which the Government subsequently transferred to Balbhaddar Singh in exchange for three of the taluqdari sanad villages or parts of them, and consequently must be treated as taluqdari villages which on Balbhaddar Singh's death

death to Sheo Singh. The pleader for Rani Raghubans Kunwar gave up on her behalf all claim to the village.

Puraina was entered in the summary settlement of 1859 in the name of Janki Pershad as the proprietor. It had been mortgaged to Thakur Umrao Singh, under a mortgage with possession of 1245 Fasli (1837—1838), which became irredeemable by reason of Act XIII of 1866, and the Settlement Officer on the 30th of June, 1868, gave Balbhaddar Singh, who was the legal representative of Thakur Umrao Singh, a decree for the full proprietary possession. Puraina was non-taluqdari property at the time of the sanad of 1861.

Patti Bhupatpur was entered in the summary settlement in the names of Jangu and Lachman as the proprietors. Balbhaddar Singh obtained a decree for one-third of the village on the 7th of February, 1868, under a mortgage by conditional sale which had been granted in 1248 Fasli (1840—1841) by the then proprietors. In an application for partition Balbhaddar Singh described Patti Bhupatpur as not comprised in any taluqa, and in 1894 he purchased another one-third of the patti. It was non-taluqdari, and was not included in the sanad of 1861.

Munda Nizampur was inherited by Balbhaddar Singh from Anand Kunwar, and could not have been included in the sanad of 1861. It is not taluqdari.

Benipur was purchased by Balbhaddar Singh between 1880 and 1884, and was not included in the sanad of 1861. It is non-taluqdari.

Kasba Kheri. The register of the summary settlement does not show that it was settled with Gajraj Singh. No evidence has been referred to which shows with whom the village was settled, but as Rani Raghubans Kunwar stated in her plaint that Kasba Kheri had been settled with Gajraj Singh, it must be taken to have been included in the sanad of 1861 and to be taluqdari.

Rechan was found by the Subordinate Judge and by the Judicial Commissioner's Court to have been included in taluqa Mahewa at the date of the sanad of 1861. No evidence has been brought to the attention of their Lordships to show that those findings were not correct. Gajraj Singh paid revenue

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assessed in respect of Rechan. Rechan must be taken to be taluqdari.

Chak Sarkhanpur. In the summary settlement Chak Sarkhanpur was entered in the name of Har Pershad as the proprietor. Balbhaddar Singh acquired it by purchase. It was not included in the sanad of 1861 and is non-taluqdari.

Chak Simri was entered in the summary settlement in the name of Mohan Lal. It was purchased by Balbhaddar Singh. It was not included in the sanad of 1861, and is non-taluqdari.

Hasnapur. One-half of Hasnapur was purchased in 1270 Hijri (1853) by Umrao Singh, and the other half in 1865 by Balbhaddar Singh. Consequently one-half of the village was included in the sanad of 1861 and is taluqdari, and the other half is non-taluqdari.

Nausar Jogipur. In the summary settlement this village was entered in the name of Gajraj Singh. In a mortgage deed Balbhaddar Singh stated that this village was included in the sanad. It must be taken that the village is taluqdari.

Mukaddarpur. In a mortgage deed Balbhaddar Singh stated that this village was comprised in the sanad. The pleader of Rani Raghubans Kunwar stated at the hearing that Behari had sold it to Gajraj Singh, who, however, had not obtained possession until after the summary settlements. It must be treated as a taluqdari village.

Bastauli. In the summary settlement the two halves of Bastauli were entered in the name of Gajraj Singh, and must be taken as taluqdari.

Saharwa. In the summary settlement this village was entered in the name of Gajraj Singh. It must be taken to have been included in the sanad of 1861 and as taluqdari. Asawa, Banjargaon, Bhargawan, Jamnaha, Saunkia, Sansarpur, and Kaimahra, all these villages were found by the Judicial Commissioner's court to have been in the possession of Girwar Singh at the date of the sanad of 1861. The Subordinate Judge and the court of the Judicial Commissioner dealt with them as taluqdari villages, and nothing has been brought to the attention of their Lordships to lead them to the conclusion that these

villages, or any of them, were not included in the sanad of 1861 and were not taluqdari villages.

The result of their Lordships' view as to the villages is that to the list of villages set out in the decree of the 4th of March, 1907, of the court of the Judicial Commissioner, in respect of which Rani Raghubans Kunwar was entitled to maintain her decree for possession, the villages Puraina and Patti Bhupatpur should be added, and that no village should be struck out of that list.

Their Lordships will now consider the decree of the court of the Judicial Commissioner of the 21st of January, 1909, which was made on the hearing of the objections which were filed to the report of the Subordinate Judge which dealt with disputes as to a house in Sitapur, a house in Lucknow, and the movable property of which Balbhaddar Singh had died possessed.

The house in Sitapur was acquired by Balbhaddar Singh, and never at any time was part of the taluqdari estate which was granted to Girwar Singh by the sanad of 1861. It is non-taluqdari.

The house in the Kaiser Bagh at Lucknow. The right to the possession of this house does not depend upon the sanad of 1861, which was granted to Girwar Singh upon the surrender by him to the Government of the sanad of 1859, which had been granted to Gajraj Singh. The house in the Kaiser Bagh was not included in the sanad of 1861. It is common ground that a house in the Kaiser Bagh was allotted by the Government to Girwar Singh in 1864 or 1865 for his use as the taluqdar of taluqa Mahewa. That house was demolished when the Canning College was built, and in place of it another house, the house now in dispute, was allotted by the Government to Balbhaddar Singh for his use as the taluqdar of the taluqa Mahewa. No sanad relating to the house has been produced, nor has it been proved that any sanad relating to the house was granted. But it may be inferred from the fact that the house was allotted to Balbhaddar Singh for his use as taluqdar of Mahewa that such right to possession of it as he had passed, not to his widow, but to his successor in the taluqdari of Mahewa.

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The movable property of which Balbhaddar Singh died possessed was not subject to the limitation of descent which was by the sanad of 1861 prescribed for the villages which were included in that sanad, and passed on his death to his widow, Rani Raghubans Kunwar.

The decree of the court of the Judicial Commissioner, dated the 21st of January, 1909, should be varied by decreeing that the suit of Rani Raghubans Kunwar should stand dismissed so far as her suit related to her claim for the possession of the house at Lucknow.

Thakur Rajindra Bahadur Singh, who was brought upon the record as the representative of his late father, Sheo Singh, died in 1912, and Rani Raghubans Kunwar died in 1910, and their Lordships have been much pressed to advise His Majesty as to who is now entitled to the property other than taluqa Mahewa as it was constituted at the date of the grant of 1861, in respect of which Rani Raghubans Kunwar brought her suit in 1900 in the court of the Subordinate Judge of Sitapur, but their Lordships are not in a position to tender such advice, and can only advise His Majesty as to the rights of the parties as they existed at the time when the decrees of the court of the Judicial Commissioner now under appeal were made.

Their Lordships will humbly advise His Majesty that the decree of the court of the Judicial Commissioner of the 4th of March, 1907, should be varied by adding to the list of villages set forth in that decree the villages Purana and Patti Bhupatpur, and that the decree of the court of the Judicial Commissioner of the 21st of January, 1909, should be varied by decreeing that the suit of Rani Raghubans Kunwar should stand dismissed so far as her suit related to her claim for possession of the house at Lucknow, and that so varied those decrees should be affirmed as of the dates when they were made respectively by the court of the Judicial Commissioner, and should have effect accordingly as to the rights of the parties who were concerned at those respective dates and of those claiming under them. No costs of these consolidated appeals as between the parties to them

Solicitors for Thakur Rajendra Bahadur Singh: *Downing, Hancock, Middleton and Lewis.*

Solicitors for Rani Raghubans Kunwar: *T. L. Wilson & Co.*
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KANHAI LAL (PLAINTIFF) v BRIJ LAL AND OTHERS

(DEFENDANTS)

And another appeal Two appeals consolidated.

[On appeal from the High Court of Judicature at Allahabad]

Hindu law—Reversioners—Compromise of disputes between the widow of the last male owner who took the whole estate of a Hindu joint family by survivorship and other widows of family entitled only to maintenance and person who claimed to have been adopted by one of widows—Division of the property between them—Claims inducing widow of sole male owner to agree to take less than she is entitled to and to alter her position to her detriment—Future claim by alleged adopted son for possession of the whole estate—Estoppel of claim as reversioner by compromise proceedings.

At the time of his death in 1883 B, one of three brothers, was by survivorship the sole owner of the estate of a Hindu joint family, and his widow became entitled to that estate for life. Her title was, however, disputed by the present appellant and by P and K, the widows of predeceased brothers of B. The appellant set up a claim to the entire family estate based on the allegation that he had been adopted by P to her deceased husband, and was entitled as such adopted son to the whole property. P supported his claim, and together with K alleged that the three brothers had separated, and that their three widows were each entitled to a one-third share of the estate. To protect her own interests and those of her daughter the widow of B brought two suits; one on the 20th of January, 1891, against the appellant and P for a declaration that the appellant's alleged adoption was null and void. That suit was dismissed on a technical ground, and an appeal against the decree dismissing it was preferred to the High Court at Allahabad. The other suit was brought on the 4th of February, 1892, against P and K claiming a declaration that B, her late husband, had been the sole owner and possessor of the entire family property, that on his death she was herself in possession of and entitled to that property according to Hindu law, and that P and K had no rights in it except to maintenance. Before the second suit came on for hearing, B's widow, her daughter, P, K, and the appellant had, on the 1st of August, 1892, entered into a compromise referring their disputes to arbitration the result of which was that B's widow, her daughter, P and K each obtained possession of a one-fourth share of the property in dispute. The appellant, though allotted no share of the family property, obtained the share allotted to his adoptive mother P, who relinquished it to him by executing a deed on the 22nd of August, 1898, in his favour. In the award it was stated that the appellant had been adopted by P,

* Present—VISCOUNT HALDANE, Sir JOHN EDGE, Mr. AMHERST, and Sir WALTER PHILLIMORE, PARS.

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but that he had nothing to do as such adopted son with the shares allotted to the other ladies. He obtained in accordance with *P's* deed of relinquishment mutation of names in his favour. The appeal in *B's* widow's first suit was not supported and was dismissed, and the second suit was withdrawn. In suits filed respectively on the 15th of July, 1912, and the 28th of August, 1913, by the appellant for possession, as reversioner to the estate of *B*, of the properties allotted in January, 1893, to *B's* widow, her daughter, and *K* respectively.

Held (affirming the decision of the High Court) that the appellant was precluded from claiming as a reversioner by his having been a party to the compromise entered into in 1892, which, and the awards made in accordance with it, were binding on him. He had at that time no right of any kind to any share of the property of the family: at best he had the mere expectancy of being reversioner on the death of *B's* widow.

Sumsuddin Goolam Husein v. Abdul Husein Kalimuddin (1) distinguished.

The claim of the appellant influenced *B's* widow, who was induced, mainly by that claim, but also by the claim of *P* and *K*, to consent to a division of the family property in which she only obtained a one-fourth share. By those claims she was induced to agree to a compromise against her own interests and those of her daughter, and to alter her position greatly to her own detriment. The appellant was a party to it, and under it he obtained a substantial benefit which he has ever since enjoyed. He was consequently bound by the compromise, and could not now claim as a reversioner.

CONSOLIDATED appeals, 67 and 75 of 1917, from a judgment and two decrees (15th June, 1915) of the High Court at Allahabad which partly affirmed and partly reversed a judgment and decree (30th April, 1913) and affirmed a judgment and decree (31st August, 1914), both of the court of the Subordinate Judge of Shahjahanpur.

The question for determination on these appeals was whether an agreement, dated the 1st of August, 1892, and executed by, among others, the appellant Lala Kanhai Lal, and two arbitration awards, dated the 12th and 13th of January, 1893, and made in pursuance of such agreement, were binding on the appellant, so as to estop him from enforcing his right as a reversioner.

For the purposes of this report the facts of the case are sufficiently stated in the judgment of the Judicial Committee.

The judgment appealed from was a decision of *W. TUDBALL* and *M. RAFIQ, JJ.*

On these appeals—

De Gruyther, K.C., and *B. Dube* for the appellant contended that he was not estopped by the compromise and award made

in 1892-93 from now enforcing his reversionary rights, which only accrued to him after the death of Ram Del in 1912. He was a party to those proceedings not as the pre-emptive reversionary heir of Bahadur Lal, but merely as the adopted son of Parbati. There was nothing in these proceedings which could be treated as a conveyance or relinquishment of his reversionary rights, which then did not exist. He had no power to renounce or part with a mere expectancy of reversionary rights which might be his in the future; such possibilities were not then in the contemplation of the parties. Reference was made to *Sumsuddin Goolam Husein v. Abdul Husein Kalimuddin* (1). Nor did he do anything in the proceedings of 1892-93 which could have led anyone to believe that he by his conduct relinquished his reversionary rights, and to act on such belief. In fact no change had taken place in position of any party in consequence of his action in such proceedings.

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Sir *H. Erle Richards, K.C.*, and *J. M. Parikh* were not called upon.

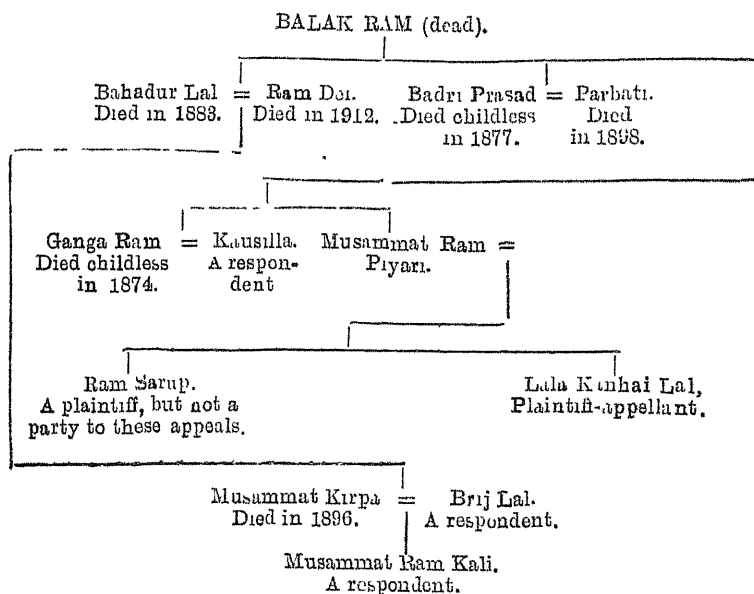
1918, *March 15th*:—The judgment of their Lordships was delivered by Sir JOHN EDGE:—

These are consolidated appeals from decrees, dated the 15th of June, 1915, of the High Court at Allahabad, made in appeals from decrees of the court of the Subordinate Judge of Shahjahanpur. There were two suits, in each of which Lala Kanhai Lal and his brother, Ram Sarup, were the plaintiffs. Lala Kanhai Lal is now the appellant in these consolidated appeals. Ram Sarup's rights were established and are not now in question; he is not a party to these appeals. In one of these suits Lala Brij Lal and his daughter, Musammat Ram Kali, were defendants; they are now respondents to one of these appeals. In the other suits Musammat Kausilla and Lala Sham Lal, who claims through her, were the defendants; they are the respondents to the other of these appeals. In each suit Lala Kanhai Lal claimed as a reversioner to one Bahadur Lal, who died in 1883. Bahadur Lal was a member of a Hindu joint family descended from one Balak Ram. The

(1) (1906) I. L. R., 31 Bom., 165.

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pedigree of the joint family, so far as it is now material, is briefly as follows :—



Upon the death of Ram Dei, on the 14th of May, 1912, Lala Kanhai Lal and his brother, Ram Sarup, were the reversioners to Bahadur Lal. The only question which their Lordships have to consider in these appeals is the question whether Lala Kanhai Lal has not been precluded from claiming as a reversioner by his having been a party to a compromise which was entered into in 1892. If he is not precluded from claiming as a reversioner, he is entitled to succeed in these appeals.

At the time of his death, in 1883, Bahadur Lal was by survivorship the sole owner of the family estate, and on his death his widow, Musammat Ram Dei, became entitled to that estate for her life, Musammat Parbati and Musammat Kausilla being entitled only to maintenance. The title of Musammat Ram Dei was, however, disputed by Lala Kanhai Lal, Musammat Parbati, and Musammat Kausilla. Lala Kanhai Lal set up a claim to the family estate alleging that he had been adopted by Musammat Parbati to her deceased husband, Badri Prasad, and was entitled to the whole estate as such adopted son. His case was that there was a custom in the family which enabled a brother to adopt his

sister's son and that Musammat Parbati had received her husband's authority to make the adoption. It is not necessary to consider whether there was any foundation for that case. Musammat Parbati's case was that the brothers Bahadur Lal, Badri Prasad, and Ganga Ram had separated; that also was the case set up by Musammat Kausilla. Each of these widows claimed for life one-third of the family estate. Musammat Parbati also alleged that she had validly adopted Lala Kanhai Lal to her deceased husband Badri Prasad.

In order to protect her own interests and the interests of her daughter, Musammat Kirpa, who was then living, Musammat Ram Dei brought two suits in the court of the Subordinate Judge of Shahjahanpur. The earlier of those suits was brought on the 20th of January, 1891, against Lala Kanhai Lal and Musammat Parbati and in that suit Musammat Ram Dei claimed a declaration that the alleged adoption of Lala Kanhai Lal by Musammat Parbati was null and void. That suit was dismissed by the Subordinate Judge on the technical objection that the plaint had not been properly verified. From the decree dismissing that suit Musammat Ram Dei appealed to the High Court at Allahabad. The latter of those two suits was brought on the 4th of February, 1892, against Musammat Parbati and Musammat Kausilla, and in it Musammat Ram Dei claimed, amongst other reliefs, a declaration that her late husband, Bahadur Lal, had been the owner and in possession of the entire property of the joint family; that after his death she, Musammat Ram Dei, was in possession of and entitled to that property according to Hindu law, and that Musammat Parbati and Musammat Kausilla had no right other than that of maintenance.

Before the suit of the 4th of February, 1892, came on for trial Musammat Ram Dei, Musammat Parbati, Musammat Kausilla, Musammat Kirpa, and Lala Kanhai Lal, had entered, on the 1st of August, 1892, into the following agreement of compromise :—

"We, Musammat Ram Dei, widow of Bahadur Lal, Musammat Parbati, widow of Badri Prasad, Musammat Kausilla, widow of Ganga Ram, Musammat Kirpa, daughter of the said Bahadur Lal, and Kanhai Lal, the adopted son of the said Musammat Parbati, by caste Agarwal, residents of muhalla Muzaffarganj, in Shahjahanpur, do declare as follows :—

"Whereas disputes relating to property and 'imlak' have existed between Musammats Ram Dei, Parbati, and Kausilla, and I, Musammat Kirpa, daughter

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of Ram Dei, and I, Kanhai Lal, the adopted son of Parbati, are also regarded as claimants, we, the five persons, of our free will and accord and in a sound state of body and mind, declare that we have appointed Maharaj Badri Prasad, the general attorney of Musammat Durga Dei, as referee, and he should divide the whole of the property consisting of villages, houses, and shops as specified below and his decision as regards the profits for the past years, the villages sold after the death of Bahadur Lal and the cases at present pending in the civil and revenue courts, whatever it may be, will be admitted and accepted by us. There will be no objection or denial on our part. If any of us, the executors, take any objection, it will not be entertainable. The mode of partition of property agreed upon is that with the exception of the 'thakurdwara' of Musammat Ram Dei, the 'thakurdwara' of Musammat Parbati, the villages of Bartara, Nagra Badhipura, the grove situate in Panwari (?) and the 10 biswa share of Simri, tahsil Pawayan, which have been made a 'waqt' of for the expenses of the 'thakurdwara' and for charity, he should make four equal lots of all the villages, the shops, the banking 'kothis' and the money-lending business, the decrees, bonds and account-books in such a way that each lot may, so far as possible, contain the above things as a whole. After the preparation of the lots, Musammats Ram Dei, Parbati, Kausilla, and Kirpa may each duly draw one of the lots. After that they should make applications for mutation of names in the Revenue Department and get (their) names recorded. I, Musammat Kirpa, and I, Kanhai Lal, will have no claim against any sharer as regards this property. Every sharer will be the owner and possessor of (her) property and will have power to make every kind of transfer as a proprietor. The said Maharaj Sahib may come to any decision he pleases as regards the partition and preparation of lots and the settlement of disputes mentioned above and enter all the particulars in detail in the arbitration award by the end of September, 1892, and get it registered. All that will be admitted and accepted by us. None of us will deviate from it

"This agreement has accordingly been executed to stand as evidence.

"Dated the 1st of August, 1892.

"By the pen of Lalta Prasad, Kayasth, resident of Rang Muhalla,

(Sd.) RAM DEI.

" PARBATI.

" KAUSILLA.

" KIRPA.

" KANHAI LAL."

The arbitrator made two awards, dated respectively the 12th and the 13th of January, 1893. That of the 12th of January, 1893, was filed in the suit of the 4th of February, 1892, in which Musammat Parbati and Musammat Kausilla were defendants and that suit was dismissed as withdrawn by Musammat Ram Dei. The appeal to the High Court, in the

Under the awards of the arbitrator one-fourth of the family property was allotted to Musammat Ram Dei, one-fourth to Musammat Kirpa, one-fourth to Musammat Parbati, and one-fourth to Musammat Kausilla, and they respectively obtained possession of the properties allotted to them. In the award of the 13th of January, 1893, the arbitrator stated :—

“ Kanhai Lal has been adopted by Musammat Parbati, but he has nothing to do with the other Musammats' property as such adopted son. Nor has he now any claim to their property. As regards the matter between Musammat Parbati and Kanhai Lal, it is not necessary to explain his rights in this award. Kanhai Lal's rights in the property comprised in Musammat Parbati's lot are quite safe. ”

So far as appears by the agreement of compromise and the awards, Lala Kanhai Lal got no share in the family property, but in fact he got the one-fourth share which was allotted to Musammat Parbati, and he further obtained the benefit of having the validity of his adoption by Musammat Parbati left undecided by a court of law. On the 22nd of August, 1893, Musammat Parbati executed, in favour of Lala Kanhai Lal, a deed of relinquishment of the property which had been allotted to her under the compromise and the award of the 13th of January, 1893. In that deed she stated :—

“ The immovable property, such as zamindari, houses, and shops detailed as below, belonged to Lala Badri Prasad, the husband, of me the executant. I, the executant, have, with the permission of my husband, adopted to my husband and myself, Lala Kanhai Lal, son of my husbands' sister, for the benefit of the soul of my husband in the next world. Kanhai Lal aforesaid has been living with me from the date of the permission to adopt. It is he who is the absolute owner of the entire property and legal representative of the entire property left by my husband. But the name of me, the executant, has continued to be recorded in the revenue papers against the zamindari property. I am not the owner thereof. Kanhai Lal aforesaid is the owner of the entire property of my husband. Now I, the executant, do not also want my name to stand recorded in the revenue papers. Therefore I, of my own free will and accord, without force and

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coercion, relinquish my claim to the whole of the zamindari property and houses and shops, detailed as below, in favour of Kanhai Lal, adopted son of my husband and myself, and covenant in writing that Kanhai Lal aforesaid is the owner of the entire property detailed below as representative of my husband, Lala Badri Prasad. He has acquired as absolute owner all sorts of powers in respect of the property detailed below. Up to this time my name stood recorded in the papers only fictitiously. Now I do not want that my name should stand recorded in the column of proprietors. My name, which is entered against the whole of the zamindari property, should be expunged and the name of Kanhai Lal be entered in the papers."

In accordance with that deed of relinquishment, Lala Kanhai Lal obtained mutation of names in his own favour, and he has hitherto enjoyed that share of Musammat Parbati as his own property, and his right to it has not been questioned in either of the present suits. The properties which Lala Kanhai Lal has claimed in these suits as a reversioner to Bahadur Lal are the properties which were allotted, in January, 1893, to Musammat Ram Dei, Musammat Kirpa, and Musammat Kausilla respectively.

The suits in which these appeals have arisen were not tried by the same Subordinate Judge. In one of these suits the Subordinate Judge held that Lala Kanhai Lal was precluded by his having been a party to the compromise from now claiming as a reversioner. In the other of these suits a different Subordinate Judge decided that Lala Kanhai Lal was as a reversioner not bound by the compromise. The decrees of the court of the Subordinate Judge were appealed to the High Court, and the appeals were considered by the High Court in one judgment. The High Court decided that Lala Kanhai Lal having been a party to the agreement of compromise of 1892, and having taken a benefit under that settlement of the dispute, was bound by it and could not go behind it. The result was that Lala Kanhai Lal's suits were dismissed. From the decrees of the High Court made in accordance with that judgment these appeals have been

his right to claim as reversioner unless it is capable of being treated as a conveyance of his right as a reversioner, and that he did not intend in 1892 to convey or assign such right when it might accrue to him. As it now appears, Lala Kanhai Lal was not a reversioner in 1892, and did not become a reversioner until Musammat Ram Dei died in 1912. All the interest which he had in the property of the family in 1892 was the mere possibility of becoming an immediate reversioner, in case he should be living when Musammat Ram Dei might die, and when Bahadur Lal's daughter, Musammat Kirpa, might die without a son. It was also contended on his behalf that Lala Kanhai Lal in 1892, whatever his intention may have been, was not in law, competent to convey or relinquish any future possible right as a reversioner, and as an authority in support of that contention the decision of the High Court at Bombay in *Sumsuddin Goolam Husein v. Abdul Husein Kalimuddin* (1) was relied upon. That decision is not in point. There is no question here of a conveyance of, or of an agreement to convey, any future right or expectancy, or of an agreement to relinquish any future right or expectancy. The question here is whether Lala Kanhai Lal did not by his acts in 1892 debar himself from now claiming as a reversioner.

The facts in this case are simple. In 1892 the family was a Hindu joint family to which the ordinary Hindu law applied. All the sons of Balak Ram had died. Ganga Ram had died childless in 1874, and Badri Prasad had died childless in 1877. Bahadur Lal had died sonless in 1883, leaving his widow, Musammat Ram Dei, surviving him. Musammat Ram Dei became, on the death of Bahadur Lal, entitled for life to a Hindu widow's right to the whole of the family property. Lala Kanhai Lal had then no right of any kind to any share in the family property, but he set up a claim to the whole property based on the allegation that he had been validly adopted by Musammat Parbati to her deceased husband, Badri Prasad. If that claim had been substantiated by proof of a valid adoption, Lala Kanhai Lal would have been entitled to the whole family property, and Musammat Ram Dei would have been entitled merely to maintenance.

(1) (1906) L. L. R., 31 Bom., 165.

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Although as a general rule of Hindu law a man cannot adopt his sister's son, the claim was a serious one. Lala Kanhai Lal's case was that, according to an Agarwal custom (the family was of the Agarwal caste) which governed the family, a man could lawfully adopt his sister's son, and he alleged that Badri Prasad had given Musammat Parbati authority to make the adoption, and that he, Lala Kanhai Lal, had been validly adopted to Badri Prasad. That Lala Kanhai Lal might have found it difficult or impossible to prove that he had been validly adopted is immaterial. He made the claim; it was a serious one, and it was supported by Musammat Parbati and it must have influenced Musammat Ram Dei, who was induced, doubtless mainly by that claim, to consent to a division of the family property, in which she obtained for herself merely a one-fourth share. The claims which were set up by Musammat Parbati and Musammat Kausilla, that the three sons of Balak Ram had separated, must also have influenced Musammat Ram Dei to agree to the compromise of 1892. Lala Kanhai Lal was a party to that compromise. He was one of those whose claims to the family property, or to shares in it, induced Musammat Ram Dei, against her own interests and those of her daughter, Musammat Kirpa, and greatly to her own detriment, to alter her position by agreeing to the compromise, and under that compromise he obtained a substantial benefit, which he has hitherto enjoyed. In their Lordships' opinion he is bound by it, and cannot now claim as a reversioner.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed with costs.

Appeals dismissed.

Solicitors for the appellant :—*Barrow, Rogers, and Nevill.*

Solicitor for the respondents :—*Edward Dalgado.*

J. V. W.

KALYAN DAS AND OTHERS (PLAINTIFFS) v. MAQBUL AHMAD AND
OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Allahabad.]

Privy Council, practice of—Omission to appeal to High Court—Decision of a subordinate court not submitted to High Court—Point taken on grounds of appeal to High Court but not pressed—Postponing appeal from interlocutory decision until appeal from final decree.

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April 18.

It is a well settled rule of practice of the Judicial Committee that an appellant when bringing up the actual decree of the High Court for review, shall not be allowed to ask to have it set aside on the ground that it has wrongly accepted a decision of the subordinate court if he himself has never brought that decision before the High Court for its consideration. Such a request would be fair neither to the Court appealed from, nor to the Board appealed to. The High Court ought not to be liable to have its determination overruled upon matters never submitted to it. The Board ought not to be called on to adjudicate finally upon matters where they have not the advantage of knowing and weighing the view taken by the learned Judges of the High Court. This had nothing to do with waiting to question an interlocutory decision until an appeal is taken from a subsequent final decree.

The same rule applies where, on appeal to the High Court, the point was mentioned in the notice of appeal, but the judgment of the High Court says of it that the appellants' advocate "stated that he did not desire to press it," and so no more is said about it.

Two consolidated appeals 131 and 132 of 1915 from one judgment and two decrees (6th November, 1912) of the High Court at Allahabad, which varied a judgment and decree (28th August, 1909) of the Subordinate Judge of Aligarh.

The main questions for determination on this appeal were whether the appellants are entitled to redeem the property in dispute, and what is the amount of money payable on redemption?

For the purpose of this report the facts are sufficiently stated in the judgement of the Judicial Committee.

The decision appealed from was by Sir H. D. GRIFFIN and E. M. DesC. CHAMIER, JJ. On this appeal—

Sir W. Garth for the appellants contended that the rights of Debi Das as mortgagee were merged and extinguished on his purchase of the equity of redemption in 1881, and could not be and were not revived by the proceedings in 1897; and that the respondents having only purchased mortgagees' rights which did

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not exist, took nothing whatever by their purchase. The intention of Debi Das to extinguish the mortgage has been found as fact; the mortgagee's rights therefore no longer exist. There are cases where a mortgagee purchasing can keep a mortgage alive, but here his intention to do so was not established and under section 101 of the Transfer of Property Act, it is submitted, the charge was extinguished. Were the purchase was before that Act came into force, but it merely declares the law as it was before the Act. The appellants contend that the respondents took nothing by the sale in 1897. [*DeGruyther, K.C.* "That question is not now open: no appeal on it was preferred to the High Court."] In the High Court it was only a question of taking accounts. The first decree of the Subordinate Judge was an interlocutory decree only. The case was tried before the Civil Procedure Code of 1908 was in force: under the Code of 1882 the appellants could have waited to appeal until the final decree was made. The present appeal is from a final decree.

DeGruyther, K.C., and *B. Dube* for the respondents 1 and 2 were not called upon.

1918, April 18th :—The judgment of their Lordships was delivered by Lord SUMNER :—

In 1863 Debi Das lent 7,700 rupees to Ram Bakhsh on a usufructuary mortgage of his half-share in a mauza, called Lodha Mai, in the district of Etah. Debi Das died a good many years ago, and the present appellants, the plaintiffs in the suit, are his representatives in interest. A suit was begun in 1877 for redemption of this mortgage, and a decree was made on payment of 6,988 rupees, which sum was brought into court. Debi Das appealed on the ground that this sum was not enough, and it was increased by a further sum of 8,956 rupees. While the appeal was pending he had managed to take the money out of court, and the mortgagors had then got possession. They paid, however, no more, and accordingly, in 1879 their redemption suit stood dismissed. Debi Das then applied to be and was replaced in possession, and, having sued for mesne profits during the time he was out of possession, he got a decree

equity of redemption at auction. Debi Das being the buyer, was put into possession as full owner in 1883

It might have been supposed that this was the end of the mortgage of 1863, but, strange as it may seem, this appeal is now brought to determine upon what terms the appellants, the representatives of Debi Das, are to be allowed to redeem it, as mortgagors some thirty years after he bought in the mortgagor's equity of redemption, as mortgagee. This paradoxical result has come about as follows :—

Debi Das continued in possession of the property as owner till 1897, and as owner he mortgaged it in 1886 to Sagar Mal. There is no copy of this mortgage forthcoming. Debi Das got behind with his payments, and in 1897, on the application of Sagar Mal, the property was put up for sale. The respondents, the defendants in the suit, or their predecessors in interest, bought it and duly obtained possession.

The proclamation of sale was dated the 27th of February, 1895. Though Debi Das had bought the equity of redemption of the 1863 mortgage in 1881 and had had possession of the property since 1883, his name, from indifference or neglect, continued to be recorded in the revenue papers as mortgagee. This may account for the wording of the proclamation of sale. The entry in the column for the description of the property was “ zamindari property in mauza Lodha Mai, out of which the shares entered as holding nos. 1, 2, and 3 are mortgaged with possession to Debi Das, under a mortgage-deed, dated the 5th of February, 1863 ” The column headed “ extent of interest of judgment-debtors in the property as far as it has been ascertained by the court ” was filled up thus ; “ (b) mortgagee right in a 7 biswa share, entered as holding no. 1 in the 10 biswa mahal, patti Debi Das ; (c) mortgagee right in a 1 biswa, 9 biswansi, 15 kachwansi share entered as holding no 2 ; (d) ditto, ditto, entered as holding no. 3.” These fractions, with another not included in the present proceedings, make up the half share originally mortgaged by Ram Bakhsh. The application for execution of the decree for sale had contained a specification of the property sought to be sold by auction ” in similar terms and the list of bids and the sale certificate, dated the 2nd of August, 1897, followed the same formula.

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It certified that the respondents' predecessor was declared to be the purchaser of property, specified as " mortgagee rights in holdings 1, 2, and 3 in the 10-biswa mahal patti Debi Das " The documents were all in regular form. There is nothing to show that there was anything in the mortgage to Sagar Mal to account for this mode of describing the subject-matter of the sale, and in the proceedings below Sagar Mal's mortgage is stated to have been secured on the 10-biswa share, of which Debi Das had become proprietor in 1881. Most probably it was the result of slavishly following the entry in the revenue papers, which had ceased for many years past to represent the true position of Debi Das towards the property.

The present suit was begun in 1906, and the plaintiffs prayed, first, a declaration that the court's sale in 1897 was a nullity, as it was inoperative to pass the proprietary rights of Debi Das and he had no mortgagee's rights to be passed, and, secondly, in the alternative, for redemption of the mortgagee rights sold, *videlicet*, the rights of Debi Das as mortgagee under the mortgage of 1863, being the only mortgage he ever held. This was the beginning of perplexity.

The assumption was that Sagar Mal, in enforcing a simple mortgage of his own, had prevailed on the court to sell his mortgagor's rights, as mortgagee under a usufructuary mortgage, to which he was a stranger. The plaintiffs asked the court to allow them to redeem a mortgage which had ceased to exist nearly a quarter of a century before, and to redeem it as against persons who had never been parties to it, and in the process of redemption their interest would be to contest what their predecessor, Debi Das, himself had done, and, as his representatives, to require the defendants to account, as if they were the parties who really represented him. In a word, Debi Das prayed to be allowed to redeem Debi Das and to have him decreed to account as mortgagee for the benefit of himself as mortgagor.

This suit has been thrice before the Subordinate Judge, and has twice been appealed to the High Court. On the first occasion the Subordinate Judge dismissed the plaintiffs' first claim for a declaration of the nullity of the sale and granted the second, the claim for redemption. He subsequently heard evidence, took

the accounts, and made a decree for a final sum. From this the plaintiffs appealed, but on questions of account only. The dismissal of their claim to have the sale of 1897 declared a nullity they did not contest. The High Court, on the first occasion, remitted the case to have the accounts re-taken, subject to certain directions which they gave. Again the account was taken, and again it was appealed. The present appeal to their Lordships' Board is against both judgments of the High Court, both the first and the second.

Their Lordships are not surprised to find in the judgments of the High Court plain evidence of the embarrassment which the learned Judges felt in affirming a decree for redemption of an extinct mortgage by the mortgagee's representatives against persons, who had only this much to do with it that they had managed to procure the court to sell something for their benefit, which was nothing but a memory of the past. The choice which the parties laid before the High Court was a limited one. The present respondents asked that the transaction of 1897 should be construed as a sale of the whole proprietary interest of Debi Das. The present appellants did not ask to have it declared a nullity, as being a sale of non-existent interests. They accepted the judgment of the Subordinate Judge that they should be allowed to redeem these interests, whatever that might mean. The High Court not unnaturally thought that they could not hold the sale to have really been a sale of the entire proprietary interest in the half-share, when every document connected with it described the subject-matter as being the specific rights of a mortgagee in that half-share, but they were careful to go no further. Had they been free to deal with the argument of the present appellants, had they heard it contended that in effect nothing was sold at all, their decision might have been otherwise.

Before their Lordships the appellants' points have been five. First, on the whole matter, they say that the respondents' predecessor took nothing by his purchase in 1897. The rest of the argument is on the accounts. The second point is that certain patwari's accounts were improperly accepted and relied on, the third that an insufficient sum was allowed to the appellants for malikana under a condition in the mortgage that the mortgagee

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should make a certain malikana allowance ; the fourth that credit should be given to the appellants in respect of payments of enhanced revenue cesses upon the property, and the fifth that interest ought to be allowed them on the 6,988 rupees, which Debi Das took out of court in 1878.

It is a well-settled rule of practice of their Lordships' Board that an appellant, when bringing up the actual decree of the High Court for review, shall not be allowed to ask to have it set aside on the ground that it has wrongly accepted a decision of the subordinate court, if he himself has never brought that decision before the High Court for its consideration. Such a request would be fair neither to the court appealed from nor to the Board appealed to. The High Court ought not to be liable to have its determinations overruled upon matters never submitted to it. Their Lordships ought not to be called on to adjudge finally upon matters where they have not the advantage of knowing and weighing the view taken by the learned Judges of the High Court. This has nothing to do with waiting to question an interlocutory decision until an appeal is taken from a subsequent final decree. The appellants' first point therefore cannot now be raised.

The second point fails *in limine*, because by the terms of the mortgage of 1863 the appellants were bound to accept the patwari's accounts, whether they were merely made up on materials furnished to him, as was the case, or were the fruits of his own independent inquiry, which probably never happens. The third was disposed of by an agreement between counsel that an additional sum of 1,000 rupees should be credited to the appellants in the account over and above what had been allowed by the decree under appeal, the question of costs not to be affected by this concession. From the fourth point the appellants are barred on much the same grounds as apply to the first. It appears that on the second appeal to the High Court this point was mentioned in the notice of appeal, and the judgments say of it that the appellants' advocate "stated that he did not desire to press it," and so no more is said about it. Their Lordships think that they must accept this statement. It is true that the same learned gentleman included this point again in the present

appellants' petition for leave to appeal to His Majesty in Council, which is dated on the very day on which the judgment of the High Court was given, but in the absence of any evidence that the judgment was erroneous on this point the appellants must accept it, and cannot raise here, by way of exception to the High Court's decree, a point which they elected not to advance for the High Court's determination.

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The fifth point remains. If any regard is had to the true facts this argument is not easy to state. In effect it is this. Debi Das now claims to receive from the respondents interest on a sum of money, which he himself had and enjoyed ever since 1878 and which they never had, or owed, or had anything to do with at all. Only by forgetting the facts and fixing the mind on the notional mortgage, which by a fiction is being redeemed in the present proceedings, is the point intelligible at all. It seems to amount to what follows. In 1878 the mortgagees under the mortgage of 1863 got 6,988 rupees on account of a redemption, which is only now taking place ; therefore they received it over thirty years too soon ; therefore they should not only allow it in account, which they have done, but should allow over thirty years' interest on it too. Alternatively, since 1878 the principal mortgage moneys under the mortgage of 1863 must be deemed to have been paid off in the proportion of 6,988 to 15,944, and as the enjoyment of the usufruct by the mortgagees was conceded only in consideration of the continuance of the mortgage loan, the enjoyment should be reduced *pro tanto* from that date ; in strictness, on redemption a part of the rents and profits collected should be returned or credited in account to the mortgagors in the above proportion, but for simplicity's sake interest at a sufficient rate will do as well. One cannot, however, help remembering here that the persons who are asked to repay these profits are the respondents, whose predecessors never collected them or had anything to do with them, and that the persons to whom they are to be repaid are the successors of Debi Das, who collected and enjoyed them and probably bequeathed them to the appellants, but this inconvenient reminiscence is for present purposes outside the

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To the first way of putting the matter their Lordships reply, as the High Court replied, that interest depends on contract, express or implied, or on some rule of law allowing it. Here there is no express contract for interest and none can be implied, and no circumstances less capable of justifying the allowance of interest as matter of law can be imagined. The mortgage of 1863 is the answer to the second view. It treats the usufruct as a whole, as a remuneration for the loan or any part of it, so long as it remains outstanding. The words are—

“Interest on the mortgage money has been agreed to be considered equal to the amount of profits, i. e., the mortgagee shall not claim interest on the mortgage money, nor shall I, the mortgagor, claim profits of the village. . . The mortgagee shall be the owner of profits, and liable for loss after payment of the Government revenue, pottani rate, chaukildar cess, and village expenses, and, with the exception of the ‘malikana’ allowance mentioned above, I shall not at all claim anything else. When I pay the whole of the mortgage money in a lump sum . . . the property shall be redeemed. During the period (of the mortgage) I shall in no way raise any dispute or offer any obstruction to the mortgagee in making collections from the tenants of the village.”

Their Lordships will humbly advise His Majesty that, by consent of the parties, the decree of the High Court, dated the 6th of November, 1912, should be varied by allowing credit to the appellants for an additional sum of 1,000 rupees, but that otherwise the decrees under appeal should be affirmed, and that these appeals should be dismissed with costs.

Solicitor for the appellants :—*Douglas Grant.*

Solicitors for the first and second respondents :—*Barrow, Rogers, and Nevill.*

J. V. W.

APPELLATE CIVIL.

*Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada
Charan Banerji*

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ANANDI KUNWAR (PLAINTIFF) v RAM NIRANJAN DAS AND ANOTHER
(DEFENDANTS)*

*Civil Procedure Code (1908), order XXI, rule 66—Execution of decrees—Suit
for declaration that property is not liable to attachment and sale—Valuation
of suit.*

In a suit for a declaration that property is not liable to attachment and sale in execution of a decree, where the value of the property in question is in excess of the amount claimed in execution of the decree, the proper valuation of the suit for the purpose of jurisdiction is, not the value of the property, but the amount for which the decree may be executed. *Khetra Pal v. Mumtas Begam* (1) followed *Radha Kunwar v. Reoti Singh* (2) referred to.

In execution of a decree for Rs. 2,259 odd passed against the appellant's husband the decree-holders attached certain property as belonging to the judgment-debtor. Thereupon the appellant, who claimed ownership of the property, brought a suit for a declaration that the said property was not saleable in execution of the said decree. She valued the property at Rs. 5,200. The court of first instance dismissed the suit, holding that the property really belonged to the husband. The plaintiff appealed to the District Judge, who confirmed the decree. The plaintiff filed this second appeal.

Pandit Narmadeshwar Upadhyay, with (Dr. Surendra Nath Sen), for the appellant, submitted that the District Judge had no jurisdiction to entertain the appeal, inasmuch as the value of the subject matter of the suit was above Rs. 5,000. It was the property and not the decree that formed the subject matter of the suit; the valuation of the suit would, therefore, be governed by the former and not the latter. The principle of the decision of the Privy Council in the case of *Radha Kunwar v. Reoti Singh* (2) fully applied to this case, and the observations at page 493 to the effect that the subject matter of the dispute was

* Second Appeal No 987 of 1916 from a decree of B. J. Dalal, District Judge of Benares, dated the 11th of March, 1916, confirming a decree of Shah Munir Adam, Additional Subordinate Judge of Benares, dated the 9th of October, 1915.

(1) (1915) I. L. R., 88 All., 72.

(2) (1916) I. L. R., 88 All., 488.

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simply the value of the property which the appellant claimed were entirely applicable to the facts of the present case. The plaintiff had nothing to do with the decree, and it was immaterial for her claim what the amount of the decree might be.

[Mr. B.E. O'Connor, for the respondents, referred to *Khetra Pal v. Mumtaz Begam* (1).]

It was submitted that, having regard to the later Privy Council case cited above, the case in I.L.R., 38 All., 72, could not be deemed to have been correctly decided.

Mr. B.E. O'Connor, and Munshi Haribans Sahai, for the respondents, were not called upon.

RICHARDS, C.J., and BANERJI, J :—This appeal arises out of a suit in which the plaintiff sought a declaration that certain property was not saleable in execution of a certain decree. It appears that the principal defendants had a decree against the plaintiff's husband. In execution of that decree they attached certain property alleging it to be the property of their judgment-debtor. The decree was for about Rs. 2,000. The plaintiff in the present suit objected to the attachment. The objection was overruled, and the plaintiff had to bring the present suit. The court of first instance held that the property was the property of the judgment-debtor and dismissed the plaintiff's suit. The plaintiff has now preferred this second appeal. The first and main objection urged is that the District Judge had no jurisdiction to hear the appeal because the value of the property was over Rs. 5,000. This objection does not come very well from the plaintiff, considering that it was she herself who preferred the appeal to the District Judge. If the argument held good it would mean that the judgment of the court of first instance had become final, and the probabilities are that no court would allow an appeal now to be presented from the judgment of the first court. We think, however, that the value of the subject matter of the suit and the appeal was below Rs. 5,000. What the plaintiff claimed was a declaration that the property was not saleable in execution of the decree, that is, for the realization of the amount of the decree. The defendants were only

concerned to the extent of the amount due under their decree. They did not care whether the plaintiff could keep the property after their decree had been satisfied. This very point was decided in the case of *Khetra Pat v. Mumtaz Begam* (1). We have been referred by Mr. Upadhyaya to the case of *Radha Kunwar v. Reoli Singh* (2). This ruling, it seems to us, supports the view that we take in the present case. There it was held that, though the mortgage decree which was sought to be satisfied, was far above Rs. 10,000, the value of the property to the decree-holder and to the judgment-debtor was below Rs. 2,000, and their Lordships of the Privy Council held that this must be taken to be the value of the subject-matter of the appeal. We consider that the appeal lay to the District Judge. It was for that court to decide questions of fact, and we think that the findings arrived at conclude the present appeal. It is accordingly dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Justice Sir George Knox.

EMPEROR v. HARKESH AND ANOTHER.*

*Act No. XLV of 18CO (Indian Penal Code), sections 336, 368—Kidnapping—
Lawful guardianship.*

A Jat girl under the age of 16 years was sent by her father to carry food to the bullocks. She never returned home. Shortly afterwards she was found in a village not far from her home in the company of two men of the same caste. She was then dressed in boy's clothes and had her hair cut short. The two men offered no explanation as to how the girl came to be with them or why she was disguised.

Held, that both the men in whose custody the girl was found were properly convicted under section 366 of the Indian Penal Code. *Emperor v. Jetha Nathoo* (3) followed.

THE facts of this case were as follows:—

Hardai, a Jat girl, under the age of 16 years, was sent one evening by her father Niadar to take food to the bullocks. The girl did not return home. No report of the girl's disappearance

* Criminal Appeal No. 1003 of 1917, from an order of E. R. Neave, Additional Sessions Judge of Meerut, dated the 29th of November, 1917.

(1) (1915) I.L.R., 38 All., 72.

(2) (1916) I.L.R., 38 All., 488.

(3) (1904) 6 Bom., L. R., 785.

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was made at the *thana*, but the father went round searching for her in the neighbouring villages. Ultimately the girl was discovered in a village not far away from her home. She was in the company of two men, Harkesh and Bhullan, of her own caste. She was wearing boy's clothes and had her hair cut short. The two men could give no explanation of how the girl came to be with them, and disguised. Harkesh and Bhullan were charged with offences under sections 366 and 368 of the Indian Penal Code and were convicted. They appealed to the High Court.

Mr. A. H. C. Hamilton, for the appellants.

The Government Pleader (Babu Lalit Mohan Banerji), for the Crown.

KNOX, J.—Harkesh and Bhullan have been convicted of offences under sections 366 and 368 of the Indian Penal Code. The charge sheet to which they were called upon to plead, as regards Harkesh, is:—"That you about the month of April forcibly took Musammat Hardai, a minor girl of about 15 years, from the lawful guardianship of her parents, with intent that she may be seduced to illicit intercourse and be sold in marriage to some one." As regards Bhullan the charge runs:—"That you about the month of June, July and a part of August kept Musammat Hardai, hiding her identity that she was a girl, with the intention of giving her in marriage and raising money from the transaction knowing that she was a minor girl kidnapped by Harkesh." The case was tried with two assessors. Both assessors gave it as their opinion that Harkesh and Bhullan were guilty of the offence specified in the charge. The learned Judge agreed with the assessors. Harkesh and Bhullan are described as Jats. The girl, respecting whom they have been charged, is also a Jat girl. Both the accused have been represented in this Court by learned counsel. Great stress has been laid on the improbability of the story given by the girl. The medical evidence shows that she is a girl under 16 years of age, and in considering whether the offence charged has been committed by the accused or not, the evidence to which we should first turn is not the evidence of the girl but the evidence of her father, Nandari. The offence is primarily an offence against him. I have carefully considered his evidence and I see no reason to

doubt it. He tells us that at the time when the girl Hardai disappeared he was ill with fever. The girl was sent one evening to take food to the bullocks. The husband and wife returned shortly after and found the girl had not gone home and had not fed the bullocks. He made inquiries from his neighbours, but no one had seen the girl. He was laid up with fever for several days, but as soon as he could, he went and searched in the neighbouring villages but could find no trace of his daughter. He tells us that this was not the only occasion upon which he searched for his daughter. He admits that he made no report at the *thana*. Stress is laid upon this as being improbable conduct and not in harmony with the rest of his deposition. But he gives his explanation. He was afraid that if inquiry was made the girl might be spirited off further, and he adds that he did fear that the chance of her marrying would be spoilt if the news got about. Anyone who is aware of a Jat's difficulties and prejudices can easily understand this, and I see nothing at all improbable in it. The medical evidence places beyond doubt that the girl at the time the occurrence took place was under 16 years of age. Niadar is supported in his statement by the witness Bija. I have examined his evidence also with much care, and it fully supports what Niadar has said. If their statements can be believed— I see no reason why they should not be believed and they have been believed by both the Judge and the assessors who heard the evidence—there is no room for supposing that Niadar was in any way privy to the removal of the girl or that he took no interest in her welfare.

When the girl was found first to the knowledge of Niadar, she had been discovered in a village not far distant from the village in which Niadar resides. There is not one word in the cross examination which supports that either Niadar or Bija or any of the Jats of Kutla had any cause for quarrel or grudge against either of the accused.

It is admitted by both the accused that the girl Hardai was in their company at or about the time when she disappeared, and it undoubtedly rests with Harkesh and Bhullan to explain how the girl under these circumstances came into their company. The girl was a female under 16 years of age : her lawful

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guardian had not consented to her being removed out of his guardianship. As regards the matter of time the story is here taken up by the girl. I agree that what she says cannot be believed. Her account is that she met Harkesh, was assaulted by him, dressed in male clothes, taken and shut up and her hair cut. This is only one of the stories told by her and it entirely disagrees in important points with the second story which she told. I discard her evidence and put it out of consideration. What I have to see is how the girl passed from the guardianship of Niadar to the keeping of Harkesh. It is quite possible that Harkesh came upon her as she was on her way home to do her father's bidding and that she was persuaded by him to accompany him and afterwards to put on male clothes and to work for him. There is evidence put forward for the defence that the girl came wandering dressed in boy's clothes. That she asked for work and was engaged by Harkesh. I agree with the learned Judge and assessors in not believing this story. It is in the first place improbable, and in the second place the evidence given is so vague, just when it ought to be definite.

Bearing all this in mind I am satisfied that an offence under section 366 of the Indian Penal Code has been fully proved against Harkesh and I dismiss his appeal.

With reference to Bhullan there is the evidence of his witness Shera which is of great importance. No reason has been shown why Shera's evidence should not be believed. He tells us that he had seen this girl living at Bhora first with Harkesh and then with Bhullan. She was dressed as a boy. People began to suspect she was not a boy but a girl. On his making inquiry as to her sex, Harkesh said she was a girl. Next morning both the accused and the girl had disappeared. Lohari, who is a chaukidar, says that as he was going to his field, about the time mentioned, with other people, he saw the girl dressed in boy's clothes and crying. Bhullan and Harkesh were quarrelling close by. Each was saying that he would take away the girl; he asked the girl thinking she was a boy, but the reply was—"I am not a boy, but a girl." She also said they were taking her about and she feared they would kill her. Upon this Bhullan began to make off, but the witness ran after him and arrested

him. There is nothing in the cross-examination to show that this witness has any malice against Bhullan. I hold this evidence is enough to show that at the time the girl was being by force compelled to go about with these two accused and their act amounted to abduction. On behalf of the accused I was referred to the case of *Emperor v. Ewaz Ali* (1). That, however, was a different case. The girl in that case was one who was found to have left the guardianship of her husband with intention to remain out of that keeping. It so far differs from the present case and I am not prepared to follow it. I was also referred to the case of *Empress of India v. Sri Lal* (2). That was an absolutely different case and in no way a guide in the present case. The case of *King-Emperor v. Ram Chander* (3) is also quite different, but I need only refer to the concluding words of that judgment to show that the circumstances of that case and of this case do not agree. The learned Judges say:—“We need hardly point out that the case would be very different if the girl had been going on a visit or message or any such like occasion.” The evidence in the present case satisfies me that the girl was going on a message when she disappeared. The case of *Emperor v. Jetha Nathoo* (4) is in my opinion a case exactly in point. As the learned Judges there point out that what have to be considered are the broad features of the case. I hold that a case of abduction with intent that the girl might be compelled to marry against her will or forced or induced to illicit intercourse has been abundantly proved against Bhullan and I dismiss his appeal.

My attention has been called to the case of *Emperor v. Abdur Rahman* (5). With great respect to the learned Judge who decided that case I hold that in that case the evidence showed that Abdur Rahman, if he did any act at all, did an act subsequent to the alleged offence of kidnapping. The Indian Penal Code does not recognize abetment after the main act, and the arguments, therefore, really amount to an *obiter dictum*.

(1) (1915) I. L. R., 37 All., 624. (3) (1914) 12 A. L. J., 265.
 (2) (1880) I. L. R., 2 All., 694. (4) (1904) 6 Bom., L. R., 785.
 (5) (1916) I. L. R., 38 All., 664.

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There remains the question of sentence. Looking at all the features of the case I think the sentences have been unnecessarily severe.

I allow the appeal so far that I reduce the sentences passed to a sentence of three years' rigorous imprisonment, both in the case of Harkesh and Bhullan; the sentences served by them will be considered part of this sentence. So far and no further I allow their appeals.

Sentences reduced.

APPELLATE CIVIL.

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March, 19.

Before Mr. Justice Tudball and Mr. Justice Abdul Raoof.

DEOKINANDAN (PLAINTIFF) v. GAPUA (DEFENDANT) *

Act No. IX of 1908, (Indian Limitation Act), schedule I, article 120 Hypothecation of movable property—Suit to recover money lent by sale of the hypothecated property—Limitation.

Where a plaintiff who has lent money on the security of movable property seeks to recover the money by sale of the hypothecated property and does not ask for a personal decree against the debtor, the limitation applicable is that provided for by article 120 of the first schedule to the Indian Limitation Act, 1908 *Madan Mohan Lal v. Kanhu Lal*, (1) *Nim Chand Baboo v. Jagabundhu Ghose* (2) and *Mahalinga Natar v. Ganapathi Subbien* (3) followed.

THE plaintiff sued on the basis of a bond, dated the 6th of September, 1911, for the recovery of the amount due thereon by enforcement of the hypothecation lien against eight buffaloes which had been pledged as security for a loan. The suit was instituted on the 20th of December, 1915. One of the pleas raised by the defendant was that of limitation. Both the courts below accepted this plea and dismissed the suit, holding that article 80 of the first schedule to the Indian Limitation Act, 1908, applied. The plaintiff appealed to the High Court.

*Pandit Narmadeshwar Upadhyaya (with Dr. Surendra Nath Sen), for the appellant, submitted that the case was governed not by article 80 but by article 120 of the Limitation Act. The relief sought by the plaintiff was not a mere simple money

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decree, but the recovery of money charged on movable property by enforcement of the hypothecation. Article 80 did not contemplate a suit like this. The only article applicable was article 120. The following cases were relied on:—*Madan Mohan Lal v. Kanhai Lal* (1), *Nim Chand Bahoo v. Jagabundhu Ghose* (2), *Mahalinga Nadar v. Ganapathi Subbier* (3). The lower appellate court has relied upon the case of *Vitla Kamti v. Kalekara* (4) which was practically overruled by the Full Bench case in I. L. R., 27 Mad., 528.

Babu *Sital Prasad Ghosh* (for the Hon'ble *Munshi Narayan Prasad Ashthana*), for the respondent, submitted that the cases relied on by the appellant were cases in which jewelry or other such property had been pawned and were in the possession of the creditor, and so the creditor was able to enforce his lien against it; whereas in the present case the pledged property consisting of eight head of cattle, without specific description and not in the creditor's possession; a hypothecation decree, therefore, if passed, would not be executable. Practically it would only be a simple money decree. Secondly, there was nothing in article 80 itself to show that a suit like the present was beyond its purview. None of the cases cited by the appellant gave any reasons why article 80 could not be applied to suits upon bonds in which movable property was pledged without possession. That article covered all cases of bonds which were not expressly provided for by any other article. Unless it could be said that the present suit was not a suit on a bond at all, article 80 was applicable, and therefore article 120 could not be applied.

TUDBALL and ABDUL RAOOF, JJ. :—The question raised in this appeal is one of limitation. The plaintiff sued on the basis of a deed of the 6th of September, 1911, to recover from the defendant the sum of Rs. 283 principal and Rs. 447 interest, total Rs. 730, together with costs and interest *pendente lite* and for the future, by enforcement of the hypothecation lien against eight black buffaloes. The defendant raised several pleas in defence, among them was the plea that the suit was barred by limitation. The court of first instance found that the bond had

(1) (1895) I. L. R., 17 All., 284.

(3) (1902) I. L. R., 27 Mad., 528.

(2) (1894) I. L. R., 22 Calc., 21.

(4) (1881) I. L. R., 11 Mad., 153.

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been executed and that the money was due, but it held that the suit was barred by limitation and on that ground it dismissed it. The plaintiff appealed. The lower appellate court held that the suit was one falling under article 80 of the second schedule of the Limitation Act, which allowed a period of three years from the date on which the bond became payable, and as the suit had been brought in the year 1915, it dismissed it as being barred by time. The plea taken before us is that under the rulings of this Court, of the Calcutta High Court, and also of the Madras High Court the article applicable to the present suit is article 120 of the second schedule, and attention is called to the rulings in *Mahalinga Nadar v. Ganapathi Subbien* (1), *Madan Mohan Lal v. Kanhai Lal* (2) and *Nim Chand Baboo v. Jagabundhu Ghose* (3). The ruling in 22 Calcutta was quoted before the lower appellate court, but it preferred to follow the ruling in *Vitla Kamti v. Kalekara* (4). Apparently its attention was not called to the fact that this had been overruled in the case of *Mahalinga Nadar v. Ganapathi Subbien* (1). Also the ruling of this Court appears not to have been quoted before it. We think that these rulings are applicable to the facts of the present case, for it is clear that the plaintiff does not seek by his suit to get a personal decree against the defendant, but only to enforce the payment of the money charged upon the buffaloes which were pledged as security. A claim against the person of the defendant is clearly barred by limitation, but the decision of this point is not quite sufficient for the decision of the suit. It is impossible to give the plaintiff a decree for his money recoverable by the sale of any eight buffaloes. It is by no means clear that these eight buffaloes are still in existence. It is clear that the only property which can be put to sale is the property which was actually hypothecated on the 6th of September, 1911. Before giving the plaintiff a decree we must have a finding from the court below on the following issue :—

Are the eight buffaloes which were hypothecated on the 6th of September, 1911, still in the possession of the defendant? If so,

- (1) (1902) I. L. R., 27 Mad., 528. (3) (1894) I. L. R., 22 Calc., 21.
(2) (1895) I. L. R., 17 All., 234. (4) (1887) I. L. R., 11 Mad., 155.

a clear and distinct description of the animals must be given so as to enable the court which executes the decree to execute it properly.

Issue remitted.

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Before Mr. Justice Tudball and Mr. Justice Abdul Raoof.

GAURI SAHAI (PLAINTIFF) v. A. C. BAHREER (DEFENDANT) *

General Rules of the High Court (Civil), rules 21, 25—Pleader's fee—Order on objection as to jurisdiction raised by defendant returning plaint for presentation to proper court—Costs

Held, that rule 21 of the General Rules (Civil), and not rule 25, applied to a case where a question as to the jurisdiction of the court, having been raised by the defendant, was decided against the plaintiff, and the plaint returned for presentation to the proper court.

ONE of the pleas in defence to a suit was that it was not within the jurisdiction of the court in which it was brought. At the request of the plaintiff's pleader the question of jurisdiction was taken up first, and it was decided against the plaintiff. The court ordered the plaint to be returned for presentation to the proper court, and awarded half the costs to the defendant. In the formal order pleader's fees were calculated at the usual rate of 5 per cent. The plaintiff objected that the calculation should be made at 1½ per cent. The court overruled this objection. The plaintiff then filed an appeal from the order returning the plaint, but the appeal was confined to the question of the correctness of the costs. At the hearing of the appeal—

Mr. Nihal Chand, for the respondent, raised a preliminary objection and submitted that although an appeal lay under order XLIII, rule 1(a), Civil Procedure Code, from an order *returning a plaint* for presentation to the proper court, yet inasmuch as the present appeal was not at all directed against the correctness of that order, but related merely to an order for costs, it was really not an appeal under order XLIII, rule 1(a), and could not be brought in that garb.

Munshi Lakshmi Narayan, for the appellant, was not called upon to reply to the preliminary objection, but he mentioned the case of *Vasudev Ramchandra v. Bhavan Jiraj* (1).

* First Appeal No 148 of 1917 from an order of Gopal Das Mukerjee, Subordinate Judge of Budaun, dated the 24th of May, 1917.

(1) (1891) L. L. R., 16 Bom., 241.

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Proceeding with the appeal, he submitted that the suit not having been decided "on the merits after contest," as provided for in rule 21 of Chapter XXI of the Rules for the Civil Courts, pleader's fee should not have been calculated at the rate of 5 per cent. Rule 25 of that Chapter applied to the present case. A decision on a question of jurisdiction was not a decision on the merits. The suit had yet to be decided on its merits, although by a different court. The trial of the question of jurisdiction could not and did not affect the merits of the case. Moreover, the "contest" mentioned in rule 21 aforesaid clearly meant a contest on the merits, and there had been no contest on the merits as yet.

Mr. *Nihal Chand* was not heard in reply on the appeal.

TUDBALL and ABDUL RAOOF, JJ.:—The facts of this case are simple. The plaintiff appellant filed a suit against the defendant. Notice was issued, a written statement filed and issues were framed. One of the issues raised the question of the jurisdiction of the court. It was pleaded by the defendant that the learned Subordinate Judge had no jurisdiction to try the suit. This issue was taken up first at the request of the plaintiff and decided in favour of the defendant. The court ordered the plaint to be returned and awarded the defendant his costs. In drawing up the decree the pleader's fee was calculated at 5 per cent. according to rule 21 of Chapter XXI of the General Rules (Civil) for the Subordinate Courts. The plaintiff objected on the ground that this rule did not apply but that rule 25 of that chapter did apply. The lower court has held that the case falls within rule 21. On behalf of the appellant it is urged that the case was not decided on the merits; but it was clearly decided after contest and on the merits of the contest so far as that contest went. We do not think that rule 25, which applies to appeals from orders and other cases, is intended to cover a case of the present kind. In our opinion rule 21 clearly applies in this case. There is therefore no force in the appeal. We accordingly dismiss it with costs.

Appeal dismissed.

REVISIONAL COURT

1918
March, 20.*Before Justice P. N. Datta, Judge.*

IN RE THE PROPERTY OF THE

*At No. III of 1917 (Public Gambling Act, 1867) — Criminal in public**place — Sentence of fine and imprisonment of one month.*

Where persons are found gaming in a public place, and it is shown to which section 13 of the Gaming Act, 1867, applies, the instruments of gambling, etc., may be seized by the police, and the money found to the confiscation of money found with them may be forfeited by the (1) following.

THIS was a reference made by the Sessions Judge of Saharanpur.

The facts of the case sufficiently appear from the referring order, which was as follows : —

“On the findings of fact of the learned Magistrate the conviction is right. The place was a public place, and I have been shown by the learned counsel for the applicant the game which was played, and am of opinion that it was distinctly a gambling one, and in no sense a game of skill. As to the sentence, the appellant has been three times fined, and it would have been idle to go on fining him.

“The learned Magistrate has, however, ordered confiscation of the money which was found in the applicant's possession. Apart from the apparent clearness of the section itself, the ruling in *Emperor v. Tota* (1) is authority that this is illegal. The case will, therefore, have to be reported to the Honble High Court, after the usual reference to the learned Magistrate, with the recommendation that this part of the learned Magistrate's order be set aside. The rest of the learned Magistrate's order should hold good.”

The Assistant Government Advocate (Mr. R. Malcomson), for the Crown.

BANERJI, J.—The accused in this case was convicted under the Gambling Act. The Magistrate who convicted him ordered confiscation of the money which was found in his possession. The learned Sessions Judge has reported the case to this Court with the recommendation that this portion of the learned Magistrate's

* Criminal Reference No. 156 of 1918.

(1) (1904) I. L. R., 23 All., 270.

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order should be set aside as not being in conformity with law. It is clear from the language of section 13 of the Gambling Act that all that could be confiscated were the instruments of gaming. This was so held in the case to which the learned Sessions Judge refers. Acceding therefore to the recommendation of the learned Sessions Judge, I set aside so much of the order of the Magistrate as directs the confiscation of the money found in the possession of the accused and direct that it be refunded to him.

APPELLATE CIVIL.

1918
 March, 22.

Before Mr. Justice Piggott and Mr. Justice Walsh.

JUMANAN AND OTHERS (DEFENDANTS) v. JAHANGIRA (PLAINTIFF.)*

*Hindu law—Hindu widow—Gift—Suit to contest alienation made by widow
 —Plaintiff not the nearest reversioner.*

In order that a reversioner may be able to maintain a suit to contest an alienation, made by a Hindu widow, of her husband's property he must either be the next presumptive reversioner or he must show that the nearer reversioners are colluding with the widow. *Rani Anand Kunwa v. The Court of Wards* (1) and *Meghu Rai v. Ram Khelawan Rai* (2) followed. *Raja Der v. Umed Singh* (3) distinguished.

THE facts of this case were as follows :—

On the death of one Tota, his widow succeeded to a life estate. She executed a deed of gift of part of her husband's estate in favour of her children by a second marriage. Thereupon, a male reversioner brought a suit for a declaration that the gift would not be binding after the death of the widow. One of the pleas in defence was that Tota had left a daughter who had an infant son, and that during the life-time of the daughter and the daughter's son, the plaintiff would not be the nearest reversioner to the estate of Tota and consequently would not be entitled to bring the suit. The plaintiff had made no mention of the daughter or her son in the plaint, and denied that she was Tota's daughter, but the court found against him on this point. It was also found that, but for the daughter and her son the plaintiff and one Tulshi, who was the second husband of the widow,

*First Appeal No. 220 of 1916, from a decree of Man Mohan Sanyal, Additional Subordinate Judge of Meerut, dated the 12th of June, 1916.

(1) (1680) J. L. R., 6 Calo, 764. (2) (1913) I. L. R., 35 All., 326.

(3) (1912) I. L. R., 34 All., 207.

would be the nearest reversioners. The lower court held that when a female or a minor intervened between the widow and a remote reversioner, the latter was entitled to bring the suit, and relying on the cases in I. L. R., 34 All., 207 and 4 I. C., 957, decreed the suit. The defendants appealed.

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Mr *Nihal Chand*, for the appellants, contended that the plaintiff was too remote a reversioner, and a suit by him was not maintainable, except on proof that the nearer reversioners had colluded with the widow or concurred in the alienation, or had refused to institute the suit or precluded themselves from doing so; *Rani Anand Kunwar v. The Court of Wards* (1). The circumstances and the manner in which the present suit was brought were similar to those of the case of *Meghu Rai v. Ram Khelawan Rai* (2) and the decision in that case applies fully to the present. The lower court has misapplied the case of *Raju Dei v. Umed Singh* (3). There the gift was made to the daughter's son himself, who was the nearest male reversioner, and so the case came within the exceptions mentioned in the Privy Council case. In the recent case of *Saudagar Singh v. Pardip Narain Singh* (4) the daughter, who was childless and widowed, had joined in making the alienation, and the suit was by some of the nearest class of reversioners.

Babu *Sheo Dihal Sinha*, for the respondent, submitted that, as had been held in the case of *Raju Dei v. Umed Singh* (3), as well as in some other cases, referred to therein, of the Allahabad High Court, a remoter reversioner could bring such a suit where the next reversioner was a female having only a life-interest. The existence of the daughter was, therefore, no hindrance to the plaintiff's bringing the present suit. The grounds of collusion etc., mentioned in the Privy Council case in I. L. R., 6 Cal., 764, were not exhaustive. The daughter's son was a minor, under the natural guardianship of his mother. The donees were half brothers of this daughter, and presumably there was collusion or acquiescence on her part. Under these circumstances, the next set of reversioners should be allowed to bring the suit. On the merits the suit was unanswerable, as the

(1) (1880) I. L. R., 6 Cal., 764.

(3) (1912) I. L. R., 34 All., 207.

(2) (1913) I. L. R., 35 All., 326

(4) (1917) 16 A. L. J., 61.

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transfer was a mere gift. The question was whether it should be defeated by reason of its having been brought by a reversioner who was next in step to the daughter's son.

Mr. *Nihal Chand*, was not heard in reply.

PIGGOTT and WALSH, JJ.:—This is an appeal by the defendants in a suit for a declaration which arose on the following state of facts. One Tota died, leaving him surviving a widow Musammat Gumanan and a daughter named Musammat Khajani. This daughter has been married, presumably since her father's death, and is now the mother of an infant son named Surju. Before the birth of the daughter's son, the nearest reversioners under the Hindu Law, after the life-estate of the widow and of the daughter, were two persons named Tulshi and Jahangira. They are distant male agnates, according to the pedigree set up in the plaint, and are equal in degree, their grand-fathers having been own brothers. Musammat Gumanan has contracted a second marriage (the parties belong to the Jat caste) with Tulshi, one of the aforesaid reversioners, and has borne him children. She has now executed a deed of gift of one-half of her late husband's estate in favour of her sons by Tulshi. Jahangira brought the suit out of which this appeal arises for a declaration that this alienation will not bind him after the death of the widow. In the plaint as filed the existence of Musammat Khajani and her son, Surju, was simply ignored. The defendants made it a part of their defence that, even after the life-estates of the widow and the daughter came to an end, the next heir to the estate would be Surju, son of Khajani, and neither the plaintiff Jahangira nor his alleged joint reversioner Tulshi. The parties were at issue upon various questions of fact in the court below. On the one hand, the defendants put the plaintiff to proof of the pedigree set up by him. On the other hand, the defendants alleged that Musammat Khajani was not the daughter of Tota at all. It seems to have been suggested that she was a daughter of Tulshi by a former wife, whom he had married before he contracted his union with Musammat Gumanan. These questions of fact have been determined by the learned Subordinate Judge in the sense already stated, and the parties before this Court are not prepared to contest these findings of fact. The appeal is based therefore upon

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a single question of law, the contention being that Jahangira should not be permitted to maintain the suit, seeing that he is not the presumptive reversioner to the estate of Tota in the presence of the daughter's son, Surju. Since the decision of their Lordships of the Privy Council in *Rani Anand Kunwar v. The Court of Wards* (1) this question of law may be regarded as having been definitely settled. The right to maintain a suit of this sort does not belong to any one who may have a possibility of succeeding to the estate of inheritance held by the widow for her life. As a general rule the suit must be brought by the presumptive reversionary heir. It may be brought by a more distant heir, if those nearer in the line of succession are in collusion with the widow or have precluded themselves from interfering. These principles were applied by a Bench of this Court in a case very similar to the present, that of *Meghu Rai v. Ram Khelawan Rai* (2), and this decision seems to be clearly in favour of the defendants appellants and against the view taken by the court below. The learned Subordinate Judge founded his decision on the case of *Raja Dei v. Umed Singh* (3). That case would be on all fours with the present if the gift by Musammat Gumanan had been in favour of the minor Surju, son of Musammat Khajani. It could then have been said that the donee was precluded from suing to contest the validity of the gift and that a more distant reversionary heir was entitled to come forward and assert his rights. On the facts now before us the only arguable plea which can be taken on behalf of the plaintiff respondent is based upon the fact of Surju's minority. This, however, in no way precludes the bringing of a suit by a next friend on his behalf. In the plaint itself, there is no suggestion of collusion on the part of the minor, or of the minor's mother as his natural guardian. Their interest is simply ignored. On this state of facts the plaintiff cannot claim the benefit of the exceptions recognized by their Lordships of the Privy Council to the general principles that the suit for a declaration of this sort must be brought by the presumptive reversionary heir. This appeal therefore must succeed. We allow it accordingly and,

(1) (1889) I. L. R., 6 Cal., 764 (2) (1913) I. L. R., 35 All., 326.

(3) (1912) I. L. R., 34 All., 207.

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setting aside the decree of the court below dismiss the plaintiff's suit with costs throughout.

Appeal allowed.

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March, 22.

Before Mr. Justice Tudball and Mr. Justice Abdul Raoof.

KUNJ BEHARI LAL (DEFENDANT) v. THE BHARGAVA COMMERCIAL BANK, JUBBULPORE PLAINTIFF) *

Act No IX of 1872 (Indian Contract Act,) section 176—Pledge—Sale by pawnee of property pledged—Notice of sale

The words - "He may sell the things pledged on giving the pawnee reasonable notice of the sale" as used in section 176 of the Indian Contract Act, 1872, mean that the pawnee must give reasonable notice of his intention to sell it does not necessarily mean that a sale should be arranged beforehand and that due notice of all the details should be given to the pawnee.

THE facts of this case were as follows:—

In 1912, the plaintiff Bank advanced a loan of Rs. 1,700 to the defendant on the security of certain ornaments which were pledged with the Bank for that purpose. From January, 1914, onwards the Bank began to press for re-payment and gave repeated notices of their intention to sell the ornaments in satisfaction of their dues. The defendant, on various occasions, asked for and obtained time for payment. Ultimately, on the 15th of September, 1914, the Bank gave notice that if the account was not settled within a fortnight they would sell the ornaments without further reference. The money not having been paid, the Bank sold the ornaments on the 5th of October, 1914. The sale proceeds proved insufficient to discharge the debt in full and the present suit was accordingly brought to recover the balance. The defendant pleaded that proper notice had not been given and the ornaments had been sold at an under-value. He urged that he should be given credit for the full value of the pledge. The lower courts held that the notice given was reasonable, and though the sale had been at some under-value, yet the Bank not being guilty of fraud or any other irregularity, was not liable for the loss suffered by the defendant. The suit was accordingly decreed. The defendant appealed to the High Court.

Pandit *Kailas Nath Katju*, for the appellant, submitted that on a true construction of section 176 of the Indian Contract Act

* Second Appeal No. 950 of 1913, from a decree of D. R. Lyle, District Judge of Agra, dated the 7th of June, 1913, confirming a decree of Chatur Behari Lal, Munsif of Agra, dated the 31st of March, 1916.

the pawnee was bound to give reasonable notice not only of his intention to sell but of the actual sale itself. Under section 177 the pawnor had a right of redemption up to the moment of the actual sale of the goods pledged. This provision of the law would become nugatory if it were open to the pawnee to sell the goods whenever he liked, provided he had given reasonable notice of his intention to sell. The power of private sale is one liable to be gravely abused to the serious injury of the pledgor, and the Legislature might well have intended, having regard to the conditions prevailing in this country, that the sale of a pledge should only take place in the presence of the pledgor, or with notice to him of the date and time of sale, so that he might have an opportunity of being present at the sale, if he wished to do so. The language of the section itself pointed to that conclusion. Notice was required of "the sale," and not of "the intention to sell." If the Legislature had intended otherwise it could easily have used more apt and explicit language, as it had actually done in section 107 of the Act, and section 69 of the Transfer of Property Act. The fact that the language of section 176 was different from section 107 of the Contract Act made it clear that the same thing was not intended. The presumption was that to convey the same meaning the Legislature would use the same language throughout the same Statute. Reference was also made to the passage in Story on Bailments, 5th edition, section 310, page 322, that the pawnee "may file a bill in equity against the pawnor for a foreclosure or sale, or he may proceed to sell, *ex mero motu, upon giving due notice of his intention to the pledgor*," and it was argued that the framers of the Indian Contract Act would, had they intended to adopt Story's view of the law, have used similar language.

The Hon'ble Munshi Narayan Prasad Ashthana (with him Babu Mangal Prasad Bhargava), for the respondent, was not called upon, but referred to Cunningham and Shephard, Contract Act, 10th ed, p. 410.

TUDBAL and ABDUL RAOOF, JJ.:—The facts of this case are simple. The appellant defendant pawned to the respondent Bank certain gold and silver ornaments as security for a loan in the year 1912. In January, 1914, the Bank pressed the defendant

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for payment and stated that they had an offer of Rs. 1,480 for the ornaments and that if the defendant did not pay within a week the ornaments would be sold for the value offered and a suit would be brought for the balance. The defendant in reply asked for full particulars of the offer and also asked for time for payment. In his reply he stated that the ornaments were worth more than Rs. 2,100 and that he would hold the Bank responsible if they were sold for less than their value. The Bank on the 26th of February, 1914, sent in a statement of account and a list of the ornaments pawned and again gave the defendant fifteen days' time within which to pay, otherwise the Bank would sell. The Bank did not carry out its threat. On the 9th of May, 1914, the defendant again asked for 15th days' time as he had a chance of paying off the debt. The correspondence continued, and again on the 18th of August, 1914, the Bank wrote to the defendant stating that it had an offer of Rs. 1,500 for the ornaments and would proceed to sell. On the 25th of August, the defendant asked for further time. On the 12th of September the Bank agreed and then on the 15th of September it again wrote to the defendant saying that unless the money was paid within 15 days the jewelry would be sold without further reference to him. The Bank did not sell on the 30th of September, but it actually waited till the 5th of October and then carried out the sale. A suit was then brought for the balance and both the courts below have decreed the claim. One point was urged in the court below, and that is that the notice given on the 15th of September, was not a reasonable notice of the sale within the meaning of section 176 of the Contract Act. It was contended that notice of the actual date, time and place of the intended sale should have been given to the defendant. This plea was repelled by the court below. It has again been raised before us and this is the only point for our decision. It is urged that under section 177 the pawnor has a right to redeem at any subsequent time before the actual sale of the goods, that unless he is given full information of the date, time and place of the sale, it is impossible for him to redeem if

does not contemplate that the pawnee should give the pawnor information of the actual date time and place of sale. The words are—"He may sell the thing pledged on giving the pawnor reasonable notice of the sale." Thus, in our opinion, mean an intention to sell, and it does not necessarily mean that a sale should be arranged on hand and that the notice of all the details should be given to the pawnor. For instance it would be open to the pawnee to pick up the property at a considerable loss and to the highest bidder. It would be impossible for him to give the pawnor information beforehand as to who would be the final purchaser. It is quite certain that the law intends is that the pawnee should give the pawnor a reasonable time within which to exercise his right of redemption and proceed to sell if the property be not redeemed. His right to sell is analogous to the seller's right of re-selling granted under section 107 of the Contract Act and we take it that the two rights must be exercised in more or less the same method. The seller's right to re-sell under section 107 may be exercised after giving notice to the buyer of the intention to re-sell under the stipulation of a reasonable time. The language of both sections is slightly different but their meaning is practically the same. In our opinion in the circumstances of the present case the respondent Bank gave the applicant notice, and a very reasonable notice indeed of the intended sale. We have no objection to the conclusion below is correct. We therefore dismiss the appeal with costs.

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Appeal dismissed

REVISIONAL CIVIL.

Before Justice Sir Pratap Chandra Bose and Mr. Justice Poddar
G. JATUN SINGH (Plaintiff) v. KALSAHARI RANIA AND ANOTHER

1918
April, 3.

Civil Procedure Code (1908) section 14, No. 15 of 1907 (Provincial Small Cause Courts Act) section 35—Plaintiff or Small Cause Court suit—Appeal—Jurisdiction.

A Small Cause Court suit No. 273 was pending in the court of a Subordinate Judge who had Small Cause Court jurisdiction up to Rs. 500. The subordinate Judge went on leave and was succeeded by an officer whose Small Cause Court jurisdiction was limited to Rs. 250. Subsequently, by

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order of the District Judge, all Small Cause Court suits above Rs. 250 in value were transferred to the court of a Munsif. *Held* that, with reference to section 24 of the Code of Civil Procedure, the suit so transferred must be deemed to have been tried by the Munsif as a court of Small Causes, and from his decision no appeal lay.

THE facts of this case were as follows :—

A suit of a Small Cause Court nature, and valued at Rs. 278, was instituted in the court of the First Additional Subordinate Judge of Aligarh. Mr. Shams-ud-din Khan, the presiding officer of that court, was invested with Small Cause Court powers up to Rs. 500, and the suit was accordingly lodged on the Small Cause Court side. Before it came on for hearing, Mr. Shams-ud-din Khan went on five weeks' privilege leave, and made over charge of his office on the 17th of November, 1916, to Mr. Piari Lal Chaturvedi who was appointed to officiate as First Additional Subordinate Judge. By an order, dated the 24th of November, 1916, Mr. Piari Lal Chaturvedi was invested with Small Cause Court powers up to Rs. 250. On the 29th of November, 1916, the District Judge ordered that all suits of over Rs. 250 in value which were pending on the Small Cause Court side of the court of Mr. Shams-ud-din Khan should be transferred to the court of the Munsif of Haveli. This order applied to the present suit, which was thereafter tried and disposed of as a suit on the regular side by the Munsif of Haveli on the 24th of February, 1917. Mr. Shams-ud-din Khan rejoined his post on the 22nd of December, 1916. The plaintiff preferred an appeal from the decree of the Munsif. The appellate court held that under the circumstances the suit must, according to law, be deemed to have been decided by a Court of Small Causes, and so no appeal lay. Against this decision the plaintiff applied in revision to the High Court.

Babu *Piari Lal Banerji*, for the applicant : —

On the date on which the District Judge passed the order of transfer there was no existing Court of Small Causes competent to entertain the present suit. In fact *qua* that suit the Court of Small Causes ceased to exist as soon as Mr. Shams-ud-din Khan went away. At the date of the order of transfer, therefore, the suit could not be deemed to be pending in a Court of Small Causes, and the order of transfer could not come under clause (4)

section 24, of the Code of Civil Procedure. The court in which the suit was instituted, namely, the court of the First Additional Subordinate Judge invested with Small Cause Court powers up to Rs. 500, having on the 17th of November, 1916, ceased to exercise jurisdiction in the suit, the result was that by operation of section 35 of the Provincial Small Cause Courts Act the suit automatically and without any order of transfer stood transferred to the court which would have jurisdiction to try it if it were instituted on that date; namely, the court of the Munsif of Koel. So that, at the date of the District Judge's order of transfer, the suit was, according to law, pending as an ordinary suit in the court of the Munsif of Koel; it was thence that the District Judge's order operated to transfer it to the court of the Munsif of Haveli. In the District Judge's order of transfer no express mention was made of the court from which the cases were being transferred. The descriptive words used in the order only served to indicate the cases to which the order was to apply, without stating the court in which they might at that moment be pending. The case was pending either in the court of Mr. Piari Lal Chaturvedi as a Subordinate Judge, or, by the operation of section 35 of Act No. IX of 1887, in that of the Munsif of Koel; and then it was transferred to the Munsif of Haveli. In neither view would clause (4) of section 24 of the Code of Civil Procedure apply; and so, the suit would not carry with it its Small Cause Court character. There is no law that the court to which a suit goes by reason of the operation of section 35 of Act No. IX of 1887 must be deemed to be a Court of Small Causes *qua* that suit. There are no decided cases which are exactly in point; but the case of *Shyam Behari Lal v. Kali* (1) is a near one, and points out the true scope and the automatic operation of section 35 of Act No. IX of 1887. A nearer case is that of *Kauleshar Rai v. Dost Muhammad Khan* (2), but it was decided under the former Small Cause Courts Act, XI of 1865, in which there was no provision corresponding to the present section 35; hence this case does not really apply. There are observations as to the mode of operation of section 35 in the case of *Udho Singh v. Mul Chand* (3). Then, the

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(1) (1914) 12 A. L. J., 109.

(2) (1889) I. L. R., 5 All., 274.

(3) (1916) 14 A. L. J., 705 (707, 708)-

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case of *Mangal Sen v. Rup Chand* (1) supports me to this extent that it expressed a doubt whether section 25 of the former Code of Civil Procedure, corresponding to section 24 of the present Code, could apply where the Judge's order professed to transfer the cases *after* the Subordinate Judge who had Small Cause Court powers had proceeded on leave. As to the point actually decided by it, the case was dissented from in that of *Sarju Prasad v. Mahadeo Pande*, (2), which held that where a suit goes, by operation of section 35 of Act No. IX of 1887, from a court invested with Small Cause Court powers to a court not having such power, the latter is to try the suit as a regular suit and is not to be deemed a Court of Small Causes for the purpose of that suit. That case does not decide the actual point which has arisen in the present case, but it points out that the operation of section 35 of Act No. IX of 1887 is not analogous to that of section 24 (4), of the Code of Civil Procedure. Two other cases may be cited, having only a remote bearing:—*Chhotey Lal v. Lakhmi Chand* (3) and *Tirbhuvan v. Sham Sunder* (4).

Prima facie, under the Code of Civil Procedure, there is an appeal from a decree of a Munsif, and it is for the opposite party to fully and clearly substantiate that the appeal in the present case was barred by some provision, about the applicability of which there can be no ambiguity. If there is any doubt about the applicability of section 24 (4) of the Code of Civil Procedure the benefit thereof should be given in favour of an appeal.

Pandit *Kailas Nath Kalju*, (for Babu *Sarat Chandra Chaudhri*) for the opposite party:—

According to the applicant, as soon as Mr. Shams-ud-din went on leave, *ipso facto* the case went at once to the court of the Munsif of Koel. So that, supposing he got his leave cancelled, and returned the next day and was reinstated in his office, he would find that he could not do anything in any of the cases which had been pending on the Small Cause Court side of his court the day before; although there had been no order transferring those cases, and although the parties had not taken

(1) 1893 I. L. R. 18 All. 324. (3) (1916) I. L. R. 38 All. 295.

any steps therein. For, according to the applicant, all such cases would, of their own motion, have gone to another court immediately Mr. Shams-ud-din had left. There is nothing, however, in section 35 of Act No. IX of 1887, to warrant this proposition. That section gives power to the parties to take further proceedings in the other court, but it does not say that the case shall, of its own motion, go to that other court. The section is permissive, not obligatory. The word used is "may," not "shall." The suit remains where it was, unless and until a party moves the other court to take some proceedings therein, or unless there is an order transferring it. The moment that court is moved to do something in the case it becomes seized of it, but not before; and thereafter the character of the suit is determined by the nature of the jurisdiction of that court. In the present case the parties did not seek to take any proceeding relating to the suit in the court of the Munsif of Koel; nor did that court take any proceeding of its own motion. Hence section 35 was not brought into operation at all. The next question is, whether section 35 was applicable to the case. It is important, in this connection, that Mr. Shams-ud-din did not permanently leave the district. He went away temporarily, on short leave, and resumed his office on his return. Although during his absence Mr. Chaturvedi was appointed his *locum tenens*, still the latter had not conferred on him Small Cause Court powers in suits above Rs. 250 in value. So that, so far as such suits were concerned, it was practically as if no *locum tenens* had been appointed. It has been held, under such circumstances, that the Judge proceeding on leave does not cease to be a Judge of the court invested with Small Cause Court powers; i.e., he does not cease to have jurisdiction with respect to such cases; *Narayan Ravji v. Gangaram Ratanchand* (1). So that the condition precedent to the applicability of section 35, namely, that the court should have ceased to exercise jurisdiction with respect to the case was not fulfilled and section 35 could not come into operation. Unless a court having Small Cause Court powers is abolished under section 30 of Act No. IX of 1887, the court continues to exist, although the Judge may have gone on

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(1) (1903) I. L. R., 30 Bom., 664.

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leave and no successor may have been appointed or a successor may have been appointed having lesser powers. This is further borne out by a consideration of the provisions of sections 19 to 22 of Act No. IX of 1887. The appointment of Mr. Chaturvedi was immaterial so far as the cases of over Rs. 250 in value were concerned; with regard to them the position was as if no successor had been appointed, i e, the court of Mr. Shams-ud-din continued to exist, and those cases remained pending in that court, and the order of the District Judge operated to transfer the said cases from that court to the court of the Munsif of Haveli. It is a fiction of the applicant that the District Judge's order transferred the cases from the court of the Munsif of Koel to that of the Munsif of Haveli. The District Judge never professed to do so; on the contrary, he transferred the cases from Mr. Shams-ud-din's court; there is no doubt about that. It is a different matter whether his order was right or whether it was wrong. The use of the word "transferred" in section 17 of the Civil Courts Act, XII of 1887, which is the corresponding provision to section 35 of Act No. IX of 1887, shows that the Legislature contemplates the possibility of "transfer" of cases even from a court which has ceased to exercise jurisdiction or has been abolished. Further, even supposing that section 35 applied to the case, my next submission is that the suit would still retain its Small Cause Court character, and would continue to be deemed and treated as a Small Cause Court suit. I rely on the case of *Mangal Sen v. Rup Chand* (1). No doubt, a contrary view was taken in *Sarju Prasad v. Mahadeo Pande* (2). It is submitted that the view taken in the earlier case was correct. The language of section 35 obviously contemplates a mere continuation of the same proceedings, naturally, with the same results and retaining the same character. The result is the same, whether there is a transfer under section 24 (4) of the Code of Civil Procedure or by operation of section 35; the suit preserves its character in both cases. This is supported by reading with section 35 the provisions of section 150 of the Code of Civil Procedure; that the latter applies to courts exercising Small Cause Court powers is seen from section 7 of the Code of Civil Procedure. According

(1) (1891) I. L. R., 13 All. 324. (2) (1915) I. L. R., 37 All. 450.

to the applicant, the business of Mr. Shams-ud-din's court on the Small Cause Court side was automatically transferred *en bloc*, by operation of section 35, to the Munsif of Koel; and section 150 of the Code of Civil Procedure enacts that when such transfer of business *en bloc* takes place, the court to which the business is transferred shall have the same powers in dealing with it as the original court had. Accordingly, the Munsif of Koel would be deemed to have Small Cause Court powers in dealing with the case, and the suit would retain its original character throughout. Section 150 of the Code of Civil Procedure gives effect to the consideration expressed in the case in I. L. R., 13 All., 324, that what section 35 intended was a continuation of the same proceeding. There is an observation in the case of *Atwari v. Maiku Lal* (1) which supports my contention; it was there observed that if in accordance with section 35 proceedings in execution of a decree passed by a Court of Small Causes are taken in a Munsif's court, those proceedings may be regarded as proceedings held by a Court of Small Causes. As regards the case in I. L. R., 37 All., 450, already cited, it is to be observed that one of the cases approved by it was that in I. L. R., 23 Bom., 382. But the exact contrary to that decision of the Bombay Court was laid down by the Allahabad High Court in the case of *Ohhotey Lal v. Lakhmi Chand* (2) and the Bombay decision was expressly dissented from in the case of *Sukha v. Raghunath Das* (3). Another case relied on in I. L. R., 37 All., 450, was that of *Shiam Behari Lal v. Kali* (4), and it was observed that there KNOX, J., had altered the view which he had taken in I. L. R., 13 All., 324. It is to be remarked that the decision in 12 A. L. J., 109, is inconsistent. The effect of the decision was that an appeal lay in the case; accordingly, the revision should have been rejected; but it was allowed. And the case in I. L. R., 13 All., 324, does not seem to have been brought to the notice of KNOX, J., in 12 A. L. J., 109. Another of the cases on which I. L. R., 37 All., 450, would seem to be based is that of *Dulal Chandra Deb v. Ram Narain Deb* (5). One part of the decision therein,

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(1) (1908) I. L. R., 31 All., 1.

(3) (1916) I. L. R., 39 All., 214.

(2) (1916) I. L. R., 38 All., 425.

(4) (1914) 12 A. L. J., 109.

(5) (1904) I. L. R., 31 Cal., 1057.

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namely, that following the case in I. L. R., 23 Bom., 3-2, cannot, in view of the Allahabad cases mentioned above, be regarded as good law. The reasoning of the other part, which dealt with section 35, was one of expediency mainly.

A Munsif to whom a Small Cause Court suit comes under section 150 of the Code of Civil Procedure has, by the section, all the powers which the Small Cause Court had. He need not take down the evidence, *etc*, in full, as in a regular suit. To hold that an appeal lies from the decision in such a suit would be a contradiction in terms, as the appeal would practically be fruitless.

Babu *Piari Lal Banerji*, in reply:—

The argument built on section 150 of the Code of Civil Procedure is fallacious. That section does not apply here; but, assuming that it does, it does not follow that the court to which the business is transferred becomes *ipso facto* a Court of Small Causes. The distinction between a suit of a Small Cause Court nature and a suit decided by a Court of Small Causes has to be remembered. It is not denied that the suit remains of a Small Cause Court nature, but that is very different from saying that the court to which it comes by operation of section 150 of the Code of Civil Procedure, or section 35 of Act No. IX of 1887 becomes a Court of Small Causes. The denial of a first appeal is not provided for a suit of a Small Cause Court nature as such, but for a suit decided by a Court of Small Causes. A Court of Small Causes is either constituted as such or is a court on which Small Cause Court jurisdiction has been conferred, or is a court which for particular cases is deemed to be such by a fiction sanctioned by section 24 (4) of the Code of Civil Procedure. There is no other way provided for making a court a Small Cause Court. Neither section 150 of the Code of Civil Procedure nor section 35 of Act No. IX of 1887 makes any such provision. Further, section 150 applies only where the entire business, and not a portion of it only, of a court, is transferred. So, it does not apply to the present case. Transfer of business signifies much more than the transfer of a certain number of pending cases. Comparing the language of section 17 of the Civil Courts Act and that of section 35 of the Small Cause Courts Act, it is remarkable that the former does and the latter does not speak of

the "business" being transferred. This signifies that the scope of section 35 is not to transfer the "business" of the court; hence section 150 of the Code of Civil Procedure has no application where section 35 has come into operation. The operation of section 24 (4) of the Code of Civil Procedure is subject to the discretion and choice of the District Judge; that of section 35 of Act No. IX of 1887 is one over which no one has any control. The Legislature may well have taken this into consideration in not enacting that in the case of section 35, the court shall be "deemed to be a Court of Small Causes," as it is in the case of section 24 (4). Regarding the contention of the opposite party against the applicability of section 35, it is submitted that there is no warrant for the fiction that Mr. Shams-ud-din's court consisted, after he had gone on leave, of an existing Small Cause Court for cases up to Rs. 250 in value, and of another existing Small Cause Court for cases between Rs. 250 and Rs. 500 in value, but the Judge of which was absent on leave. What happened was that the Small Cause Court with powers up to Rs. 500 ceased to exist, and in its place a Small Cause Court having powers up to Rs. 250 came into existence. The fresh court was not a part of the old court, but an altogether new and different court with smaller powers. The mere fact that the case continued to be on the register of Mr. Shams-ud-din's court on the Small Cause Court side after he had gone on leave does not prove that it was pending there in a Small Cause Court. A case cannot properly be said to be pending in a court unless that court is competent to deal with it. The successor of Mr. Shams-ud-din was not competent to be anything in the case; it could not be said, therefore, that the case remained pending in the Small Cause Court in which it was filed. If Mr. Shams-ud-din continued to exercise jurisdiction in the case, then the order of transfer was illegal according to the case of *Baijoo v. Musammatt Tulsha* (1). As there was no Court of Small Causes competent to try the case at the date when it was transferred, the transfer could not have been from a Court of Small Causes.

BANERJI and TUDBALL, JJ :—This application for revision arises under the following circumstances. A suit to recover

(1) (1917) 20 Oudh Cases, 350.

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Rs. 273 upon a bond was instituted in court of the first Additional Subordinate Judge of Aligarh, who was invested with the jurisdiction of a Court of Small Causes to try suits cognizable by a Court of Small Causes not exceeding Rs. 500 in value. Whilst the suit was pending on the Small Cause Court side of the court, Mr. Shams-ud din Khan, the presiding officer of the court, proceeded on privilege leave for five weeks and made over charge of his office on the 17th of November, 1916. Mr. Piari Lal Chaturvedi was appointed to act for him as Subordinate Judge, but by an order of the 24th of November, 1916, he was invested with the jurisdiction of Small Causes in respect of suits, the value of which did not exceed Rs. 250. On the 29th of November, 1916, the District Judge passed an order transferring to the court of the Munsif of Haveli, Aligarh, all suits pending in the Small Cause Court side of the Additional Subordinate Judge's court exceeding in value Rs. 250.

The present suit was accordingly transferred to the court of the Munsif of Haveli, Aligarh, and was tried and decided by him on 24th February, 1917. From his decree an appeal was preferred by the plaintiff, but a preliminary objection was taken to the hearing of the appeal on the ground that no appeal lay, as the court of the Munsif must be deemed to have been a Court of Small Causes for the purposes of the present suit. This objection prevailed in the court below, which held that no appeal lay and on this ground dismissed it. The plaintiff has applied to this Court for revision of this order, and it is contended on his behalf that the suit must be deemed to have been tried by the Munsif as an ordinary suit cognizable in the Munsif's court; that an appeal therefore lay from the decree passed by him, and that the court below has wrongly refused to exercise jurisdiction.

The case has been ably argued on both sides, and a large number of rulings have been cited. Whilst it is contended on behalf of the plaintiff that section 35 of the Provincial Small Cause Courts Act applies to the case and that the suit must be deemed to have been transferred to the court of the Haveli Munsif from that of the Munsif of Koel, in which the suit would have been instituted had there been no court invested with the jurisdiction of a Court of Small Causes and that consequently an

appeal lay, it is urged for the opposite party that at the time of its transfer the suit was pending in a Court of Small Causes within the meaning of section 24 of the Code of Civil Procedure and was tried by the Munsif as a Small Cause Court suit, and that in any case section 150 of the Code of Civil Procedure applies.

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Holding the view that we do, we do not deem it necessary to refer to or consider the various rulings which have been cited to us. In our opinion neither section 150 of the Code of Civil Procedure, nor section 35 of the Small Cause Courts Act is applicable to this case. The business of the court in which the suit was pending was not transferred to another court, nor did that court cease to have jurisdiction with respect to that suit. As we have stated above, the suit was instituted in the court of Mr. Shams-ud-din Khan who was invested with small Cause Court jurisdiction in suits up to the value of Rs. 500. When he proceeded on privilege leave a *locum tenens* was appointed with powers to try suits of value not exceeding Rs. 250. As regards suits the value of which exceeded that amount no one was appointed to take his place. Therefore the present suit the value of which was Rs. 273, remained pending in the court of Mr. Shams-ud-din Khan. By reason of his taking leave for a short period he did not cease to be invested with the jurisdiction of a Small Cause Court Judge, and suits of value ranging from Rs. 250 to Rs. 500 must be deemed to have been pending in his court. We do not agree with the contention that under section 35 of the Small Cause Courts Act, the suit should be regarded as having passed to the court of the Munsif of Koel and been transferred from that court. The court of the Munsif of Koel was never seised of the case and no proceeding in it was had in that court. In our opinion the suit was, at the time of its transfer to the court of the Munsif of Haveli, Aligarh, pending in a Court of Small Causes, and the court to which it was transferred must, under sub-section (4) of section 24 of the Code of Civil Procedure, be deemed to be a Court of Small Causes as regards this suit, and to have tried it as such. Its decision was therefore not appealable.

It has been held in this Court in a number of cases that a court invested with the jurisdiction of a court of Small Causes is

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a Court of Small Causes within the meaning of section 24, and we see no reason to depart from this course of rulings.

We agree with the court below in holding that no appeal lay from the decree of the Munsif in this case and accordingly dismiss the application for revision with costs.

Application dismissed

APPELLATE CIVIL.

1918
April, 6.

Before Mr. Justice Piggott and Mr. Justice Walsh.

MUSLEHA BIBI AND OTHERS (DEFENDANTS) v. RAM NARAIN SAHU AND OTHERS (PLAINTIFFS) AND MUHAMMAD JAMIL-ULLAH AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), order XLI, rule 22—Appeal—Cross-objection—

Objection taken by respondent against co-respondent.

In a suit for sale on a mortgage, the deed upon which the suit was based purported to have been executed by six persons. In the court of first instance, however, execution was held to have been proved as against four only of the alleged executants. These four appealed, making the other two alleged executants respondents along with the plaintiffs. The plaintiffs also filed cross-objections in which they sought to fix the two defendants respondents with liability for the mortgage debt.

Held that the plaintiffs were not precluded from filing objections against their co-respondents. *Abdul Ghani v. Muhammad Fasih* (1) followed. *Kallu v. Manji* (2) referred to.

THE facts of this case, so far as they are material for the purposes of this report, were as follows :—

The suit was a suit for sale on a mortgage deed which purported to be executed by six persons, four men and two ladies.

The court of first instance found the deed to be proved as against the four male executants, but not as against the two ladies. The male defendants appealed, making respondents the plaintiffs and the representatives of their two alleged co-mortgagors. The plaintiffs also filed cross objections, and by these they contended that execution was proved as against the two ladies as well as against the male defendants, and that effect should be given to this contention, if allowed, in any decree which the court might pass. It was argued on behalf of the representatives

* First Appeal No. 244 of 1915, from a decree of I. B. Mundle, Subordinate

of the two ladies that it was not open to the plaintiffs to take objection to the finding of the court in favour of their co-respondents which was not challenged by them.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Dr. *S. M. Sulaiman*), for the appellants.

Mr. *B. E. O'Connor* (with him *unshi Gokul Prasad*), for the respondents.

Piggott, J.—This is a suit on a mortgage of the 17th of September, 1900. The executants of this deed were six persons. Jamil-ullah and Jalil-ullah, the two sons, and Musammât Khatun Bibi, the surviving widow of one Khalil-ullah deceased were the first three. The other three executants, Zohra Bibi, Muhammad Shibli and Muhammad Makki, were members of the same family, connected more or less distantly according to a pedigree which is to be found at page 2 of the printed record. The only point I desire to make about these three executants at present is that the pedigree does not show that they could have inherited any property from the deceased Khalil-ullah so as to be liable for payment of any portion of that gentleman's debts. The suit as brought is against the executant Jamil-ullah in person and the heirs of the remaining five executants, all of whom are since deceased. The court below has found execution proved as against the four male executants and not proved as against the two ladies Khatun Bibi and Zohra Bibi. The mortgaged property specified in the deed in suit consists of shares in three villages and certain house property and a grove, but the present suit is for realization of the entire mortgage debt from an 8 anna share of the judgment-debtors in a single village, the name of which is variously written as Gowai or Gowaipur, and also from the dwelling-house and the grove. We have no information before us as to the respective shares of the various executants of the deed in the dwelling-house or in the grove; but as regards the principal item involved in the plaintiff's claim, namely the share in village Gowaipur, an extract from the register of proprietary rights is printed at page 60B. This shows that in the village in question the six executants of the deed owned in the year 1900 an entire mahal of 16 annas and that they owned the same in certain specified shares. For our purposes it is sufficient to note that

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the shares of the two ladies came to $2/5$ ths of the whole and the shares of the 4 male executants to $3/5$ ths of the whole. The deed in suit purports to mortgage an 8 anna share out of the whole 16 annas, the said mortgaged share being the property of all the executants, but without any further specification. Now the learned Subordinate Judge, while finding it not proved that the two ladies, Musammat Khatun Bibi and Zohra Bibi, had executed the deed in suit, has nevertheless given a decree for the sale of an 8 anna share, on the ground that the male executants of the deed in suit did own between them more than an 8 anna share out of the entire 16 annas, even after excluding the shares owned by the two ladies.

We have before us an appeal by those defendants against whom the suit was decreed, and a petition of cross-objections under order XLI, rule 22, of the Code of Civil Procedure has been filed by the plaintiffs. The appeal raises in the main three points.

Firstly.—It is contended that execution of the deed in suit is not proved as against any of the executants other than Jamil-ullah.

Secondly.—It is contended that, even if execution be proved against any or all of the other executants, there has been no valid registration of the document as against any of the executants other than Jamil-ullah.

Thirdly.—It is contended that, in any event, the decree should have been for the sale of $3/5$ ths of an 8 anna share and not an entire 8 anna share.

The remaining pleas in the memorandum of appeal are either summed up in the three contentions above stated or have not been seriously pressed.

In the memorandum of cross-objections the plaintiffs contend that execution was proved as against the two ladies, Khatun Bibi and Zohra Bibi, and that effect should be given to this contention, if allowed, in any decree which this Court may pass.

It will be convenient to state at once that this petition of cross-objections was met at the outset by those defendants who represent the estate of Khatun Bibi and Zohra Bibi by a plea that the plaintiffs were not entitled to challenge the order of the

court below dismissing the suit as against the representatives of these ladies by way of a petition of cross-objections. The point is that the representatives of these ladies are arrayed along with the plaintiffs as respondents to this appeal. They were content to accept the decree of the court below as passed and have not themselves appealed against it. In support of this contention reliance is placed upon a decision of this Court in *Kanu v. Manni* (1), in which the principle contended for is laid down in broad terms. As a matter of fact the position has since been re-considered by this Court in *Abdul Ghani v. Muhammad Fasih* (2). We have been referred also to decisions of other High Courts to be found in I. L. R., 26 Cal., 114; I. L. R., 30 Cal., 655; 16 Calcutta Weekly Notes 612; I. L. R., 37 Bom., 511; I. L. R., 38 Madras, 795. It may be noted at once that it was in any event open to the plaintiffs as respondents to the appeal, to support the decree of the court below, in so far as that decree ordered the sale of a share of 8 annas, upon a ground which had been decided against them by the trial court, namely, upon the allegation that the document in suit had, contrary to the finding of the court below, been duly executed by Khatun Bibi and Zohra Bibi. It was impossible therefore to close the mouth of the learned advocate for the respondents or to refuse to re-consider this question of execution by the two ladies. As a matter of fact, under the peculiar circumstances of this case, it seems clear that the plaintiffs could not be blamed for acquiescing in the decree of the trial court so long as that decree entitled them to bring to sale a full 8 annas share: but they had ground for re-asserting their original claim, as soon as an appeal was filed on the plea that in any event only 3/5ths out of an 8 annas share should be ordered to be sold. Under the circumstances, we think it was within the competence and discretion of this Court to permit the petition of cross-objections to be heard, even as against those original defendants to the suit who were arrayed as respondents to this appeal. If we had found the contentions urged in the petition of cross-objections to be well founded in fact, we should have been prepared to give effect to them in our decision.

(1) (1931) I. L. R., 23 All., 93. (2) (1936) I. L. R., 28 All., 95.

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It is as well to take up at once this question of the execution of the deed in suit by Khatun Bibi and Zohra Bibi.

[His Lordship then discussed the evidence in the case]

I certainly do not feel prepared to reverse the finding at which the trial court has arrived on this point. I think therefore that this finding must stand and that the execution of this deed by Khatun Bibi and Zohra Bibi is not satisfactorily proved. It is not necessary, therefore, so far as these ladies are concerned, to go into the question whether there was a valid registration on their behalf.

* * *

There has therefore been sufficient proof of execution and of valid registration as against all the male executants. The only point on which the appeal must succeed is the third point. The reasons given by the learned Subordinate Judge for ordering the sale of an entire 8 annas share, after his finding against the validity of the execution of the mortgage deed by Khatun Bibi and Zohra Bibi, will not bear examination.

* * *

The result is that this appeal should succeed to this extent only, that the order for sale be not for the sale of an 8 annas share but for the sale of $\frac{3}{5}$ ths out of the share of 8 annas claimed in the plaint; otherwise the appeal fails. The appellants will pay and receive costs in this Court, in proportion to failure and success. The cross-objections are dismissed, with costs.

WALSH, J.—I agree in the order proposed.

Appeal decreed

PRIVY COUNCIL

PARBATI KUNWAR (DEFENDANT) v. DEPUTY COMMISSIONER OF
KHERRI AND ANOTHER (PLAINTIFFS).

[On a appeal from the Court of the Board of Revenue for the United Provinces
of Agra and Oudh, at Lucknow]

*P. C.
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March, 6 7.
April, 16

Enhancement of rent—Act No. XXII of 1883 (*Oudh Rent Act*), section 3 (10)
and chapter VII A—*Lease by taluqdar for collection of rents of a mauza to*
thekadar—*Amendment of Act by United Provinces Act No IV of 1901 (Oudh*
Rent Act (1886) Amendment Act)

Since the addition to the Oudh Rent Act (XXII of 1883) by the amending
Act (Oudh Rent Act (1886) (Amendment Act, 1901) of Chapter VIIA, which
deals (*inter alia*) with the enhancement of the rent of land held at a favourable
rent, and contains sections 107A to 107K, the specific enactments of chapter
VIIA are not limited in their application by section 3, sub-section (10), which
must be regarded as a mere glossary defining the terms "tenant" and
"thekadar" as those terms are employed in Act XXII of 1886 as it stood
when it was passed.

Held, therefore, where the defendant (appellant) was a thekadar or
person to whom the collection of the rents of a mauza belonging to a taluqa
had been leased in 1891 by the then taluqdar at a "favourable rate of rent,"
the rent was liable to enhancement under chapter VIIA of Act XXII of 1886
in accordance with the provisions, and on the conditions of that chapter
suitable to the circumstances of the case.

APPEAL 42 of 1917 from a judgment and decree (2nd April,
1915) of the Board of Revenue for the United Provinces of
Agra and Oudh, which reversed a decree (7th October, 1914) of
the Court of the Commissioner of Lucknow, and restored a
judgment and decree (4th June, 1914) of the Court of the Deputy
Commissioner of Sitapur.

The question for determination on this appeal was whether
or not the rent payable by the appellant for the village of
Bandhia Kalan, which is included in the taluqdari estate of
Majbgain and Shabpur, is liable to enhancement under the
provisions of the Oudh Rent Act (XXII of 1886) as amended by
the Oudh Rent Act (1886) Amendment Act (IV of 1901).

The taluqdar under the Oudh Estates Act (I of 1869) was
Raji Milap Singh, who, on the 13th of November, 1882, devised
the taluqa to his wife, Rani Dhan Kunwar, and died shortly after-
wards. The Rani obtained possession of the taluqa under his

* *Present*:—Viscount HALDANE, Lord DUNEDIN, Lord SUMNER, Sir JOHN
EPPEL and Mr. AMER ALI.

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will, and on the 23rd of February, 1891 executed a lease of the village of Bandhia Kalan to provide maintenance for her daughter (the appellant), and her grandson (the daughter's son), of which lease the following were the material portions :—

" Mauza Bandhia Kalan, pargana and tahsil Nighasan, 'Madbast' No 51, owned and possessed by me, the executant, the revenue of which, along with that of the entire 'taluka,' is paid to Government, is leased to you from 1297 Fasli up to the term of your life and that of your dear son, at a 'jama' of Rs. 584 per annum. You should take possession of the said mauza from 1297 Fasli as a lessee for life and bring into your own use all sorts of receipts, which include 'mal' and 'siwai' and pay to me Rs. 584 annual lease money, instalment by instalment, year by year, without objection, and all sorts of profits will belong to you and your dear son during your respective lives and after you and your dear son the lease of the mauza will end and it will, as before, revert to the possession of the holder of the 'ilaka' (estate). During your life and that of your dear son neither I nor any heir or representative of mine will have power to set aside the lease. If you do not pay the 'jama' reserved by the lease at the proper time, it will be duly recovered from you without interest by means of a suit in court."

This document appears to have been executed with the consent of Raj Dalipat Singh, the then sole reversionary heir.

Rani Dhan Kunwar died in 1891, and on her death litigation commenced between the appellant and the respondents as to the succession, which terminated in 1909 by the decision of the Privy Council in *Parbati Kunwar v. Chandarpal Kunwar* (1), it being held by their Lordships that the appellant was excluded by custom, and the respondents' title to the taluqa was affirmed. The estate of Raj Mangal Singh, one of the respondents, was under the management of the Court of Wards and he was represented by the Deputy Commissioner of Kheri. The other respondent was Raj Raghubar Singh.

The suit was instituted in the Court of the Deputy Commissioner of Kheri against the appellant; and was transferred to the Court of the Deputy Commissioner of Sitapur.

The plaintiff alleged the execution by Rani Dhan Kunwar of the lease, dated the 23rd of February, 1891, and that the appellant held at a "favourable rent." It prayed for possession of the entire village, i.e., 20 biswas of mauza Bandhia Kalan, by resumption of the "muafi," or if for some reason the entire mauza could not be resumed, the rent might be assessed

(1) (1909) I. L. R., 31 All., 457; L. R., 36 I. A., 125.

at a proper amount under section 107 G of Act XXII of 1886.

The defence appears from the issues, which were as follows :—

“(1) Does the defendant hold the land under an unexpired lease by which the plaintiffs are bound? (2) Can the plaintiffs sue for enhancement under section 107 G? (3) What is a fair rate of rent? (4) Was the grant made at a favourable rate of rent?”

The Deputy Commissioner held that the lease was granted at a favourable rate of rent; that the defendant had not shown that the plaintiffs were in any way precluded by the terms of the lease from taking advantage of the provisions of chapter VII A of the Rent Act; that the whole village was not liable to resumption; that the rent was liable to be enhanced; and that a proper rent was Rs. 2,000 per annum. A decree was made in accordance with that judgment.

Against that decree the defendant appealed to the Court of the Commissioner of Lucknow, which allowed the appeal and dismissed the suit. The Commissioner said :—

“There is no doubt that the rent is a favourable rent. This has been demonstrated by the Deputy Commissioner. At the same time the appellant holds the village in suit under a definite lease and for a definite time which will come to an end. She cannot, therefore, be expelled from it by resumption (section 107 G), and under these circumstances I cannot see how her rent can be enhanced under any section of Chapter VII A. She has been paying it under a definite agreement which holds good for a definite time and is still operative. To declare her an ordinary tenant of land which is already held by numbers of ordinary tenants seems to me impossible. Yet her rent can only be enhanced under section 107 G or 107 H of chapter VII A. This being impossible, I would have dismissed the suit altogether.”

From the decree of the Commissioner the plaintiffs appealed to the Board of Revenue (Mr. J. M. HOLMS, C.S.I., Senior Member, and Mr. J. S. CAMPBELL, C.S.I., Junior Member) who reversed the decree of the Commissioner, and restored that of the Deputy Commissioner of Sitapur.

On this appeal—

De Gruyther, K.O., and *Amiend Jackson*, for the appellant contended that the rent payable by the appellant under the lease, dated the 23rd of February, 1891, was not liable to enhancement under the provisions of the Outh Rent Act, XXII of 1886,

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or under any other provisions of the law : the appellant, it was submitted, did not hold at a "favourable rate" of rent within the meaning of chapter VII A of the Act, which was added to it by the United Provinces Act IV of 1901, and was not a person to whom the provisions of that chapter were applicable. Chapter VII A only applied to "grants" of land, not to thekadar. The document of the 23rd of February, 1891, was not a grant ; it gave no immediate right of occupation to the appellant who was a thekadar ; and the effect of section 3, sub-section (10), was not to make her a tenant for the purposes of chapter VII A, which did not apply to thekadar.

Sir *H Erle Richards, K.C.*, and *C. O'Gorman* for the respondents contended that the case was covered by chapter VII A of the Oudh Rent Act, 1886, and the rent was liable to enhancement ; and all the courts below had found that the land was held at a "favourable rate of rent" Under the provisions of sections 107 A and 107 B the liability to enhancement of rent exists as to all lands in Oudh held at a "favourable rent," subject to exceptions none of which apply to the present case ; and the interest of the appellant was "land" within the meaning of the Act. The appellant was not strictly speaking a thekadar ; but however that may be, thekadar were not excluded from the operation of chapter VII A. The rights of the proprietor under chapter VII A were not affected by section 3, sub-section (10), of the Act of 1886. There was no hardship caused by the liability to enhancement. There was, under Act XVII of 1876, a liability to resumption ; see section 52. In certain specific cases liability to resumption was taken away by Act IV of 1901, and the liability to enhancement of rent was substituted for it. The amount of the enhancement decreed in the case was a reasonable one.

De Gruyther, K.C., in reply :—The particular circumstances of the present case have never been provided for in the legislation that has been enacted in the matter.

16th April, 1918 :—The judgment of their Lordships was delivered by Sir JOHN EDGE :—

This is an appeal from a decree, dated the 2nd of April, 1915, of the Board of Revenue for the United Provinces of Agra

and Oudh, which set aside a decree, dated the 7th of October, 1914, of the Court of the Commissioner of Lucknow, and restored a decree or order, dated the 4th of June, 1914, of the Court of the Deputy Commissioner of Sitapur.

The suit in which this appeal has been brought was instituted in a Court of Revenue, which alone had jurisdiction to entertain the suit, a Civil Court having no jurisdiction in the matter. In the suit the plaintiffs claimed a decree for the possession of the entire village mauza Bandhia Kalan, situate in pargana Nighasan, in the district of Kheri, by resumption of the Muafi, and in the alternative that the rent might be fixed at a proper amount under section 107G of Act XXII of 1886 (the Oudh Rent Act, 1886), and other reliefs which need not be referred to. The Deputy Commissioner of Sitapur, before whom the suit came for trial, did not grant a decree for resumption, but having found that the rent was liable to be enhanced under section 107G of Act XXII of 1886, by his decree declared that the defendant was a tenant of the mauza without any right of occupancy, and determined the rent to be payable at 2,000 rupees per annum. The only question to be considered in this appeal is whether the rent at which the mauza was held by the defendant of the plaintiffs at the date of suit was or was not liable to be enhanced, and that question depends upon the nature of the lease under which the mauza was held by the defendant.

Mauza Bandhia Kalan is part of the taluqdari estate of Majhgain. On the 13th of November, 1882, Raji Milap Singh, in whom was then vested that estate, by his will devised mauza Bandhia Kalan to his wife Rani Dhan Kunwar, who on his death obtained possession of the mauza. Thereafter Rani Dhan Kunwar, in order to provide maintenance for her daughter, who is the defendant in this suit and the appellant in this appeal, and maintenance for that daughter's son, executed on the 23rd of February, 1891, the following lease:—

"Lease in favour of Chhoti Betia, i.e., Parbati, who is married at Malanpur, and also in favour of the grandson, i.e., the dear son of the said daughter granted by Rani Dhan Kunwar, 'talukdar' of Majhgain and Bhur, pargana Nighasan.

"Mauza Bandhia Kalan, pargana and tahsil Nighasan, 'Hedbast' No. 61, owned and possessed by me, the executant, the revenue of which,

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along with that of the 'entire 'taluka,' is paid to Government, is leased to you from 1297 Fasli up to the term of your life and that of your dear son, at a 'jama' of 584 rupees per annum. You should take possession of the said mauza from 1297 Fasli as a lessee for life and bring into your own use all sorts of receipts, which include 'mal' and 'siwai,' and pay to me 584 rupees annual lease money, instalment by instalment, year by year, without objection, and all sorts of profits will belong to you and your dear son during your respective lives and after you and your dear son the lease of the mauza will end and it will, as before, revert to the possession of the holder of the 'ilaka' (estate). During your life and that of your dear son neither I nor any heir or representative of mine will have power to set aside the lease. If you do not pay the 'jama' reserved by the lease at the proper time, it will be duly recovered from you without interest by means of a suit in court. You should, during the period of your lease, fully carry out all orders issued by the authorities in respect of the village, so that no stigma of disobedience of orders might attach to you or to the 'taluka' (estate). You should keep the tenantry satisfied in every way, so that the population of the village might increase and the village might not become desolate. Under proper circumstances you are also authorized to eject tenants, so that you might eject them after issuing notice of ejectment. You should, however, see that they are not oppressed. You are authorized to enhance or reduce the rent of the tenants so far as it is just. You should carry on all the affairs of the village just as they have been hitherto conducted.

"These few presents have, therefore, been executed by way of a lease to stand as evidence.

"Boundaries of mauza Bandhia Kalan:—

"*East*.—Bandhia Khurd.]

"*West*.—Hamlet of Gangaband,

"*North*.—Oudh forest,

"*South*.—Gangaband.

* Dated the 23rd February 1897

enhanced must be land held rent free or at a favourable rate of rent. By section 107I of the Act it is enacted that:—

"For the purposes of this chapter [chapter VII A] a grant of land at a favourable rate of rent means a grant of land at a rent less than the average rate of the revenue and local rates payable thereon."

All three Courts in India have found that the rate of 584 rupees, which was made payable by the lease of the 23rd of February, 1891, was a favourable rate of rent within the meaning of chapter VII A. But it has been contended on behalf of the appellant that chapter VII A does not apply to persons holding land as thekadars. That contention is based on section 3, clause (10), of the Act, according to which a—

"tenant means any person, not being an under-proprietor, who is liable to pay rent; and in the following portions of this Act, namely, sections 13, 14, 15, 17, 18, 29, 58, 61, 65, sub-sections (1) and (2), 59, 60, 61, 62, 108, 126, and 138, but in no others, the expression 'tenant' shall be held to include a thekadar or person to whom the collection of rents in a village, or part of a village, has been leased by the landlord."

Section 3 (10) which contains this definition was part of Act XXII of 1886 as it was passed in 1886. Chapter VII A, which deals with the resumption and the enhancement of the rent of land held rent free or at a favourable rate of rent and contains section 107A to section 107K was added to Act XXII of 1886 in 1901 by an amending Act, U. P. Act IV of 1901, and consequently the specific enactments of chapter VII A are not limited in their application by section 3 (10), which must be regarded as a mere glossary defining the terms "tenant" and "thekadar" as those terms are employed in the Act XXII of 1886 as it stood in 1886 when it was passed.

The object of enacting Chapter VII A which the Government of India had in view obviously was the protection of the Government revenue assessed upon agricultural lands, and as far as possible to maintain proprietors of lands in a position to enable them to pay the Government revenue and the local rates assessed upon their lands and thus to avoid losing their lands by making default in payment of the revenue due to the State. In some parts of India, in Oudh for instance, many proprietors of lands were in the habit of acting improvidently in making grants of lands, by lease or otherwise, rent free or at rents which did not enable them to pay the public revenue and local

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rates assessed upon their lands. As early as 1793 the Governor General in Council passed Regulation XIX of 1793, with a similar object of protecting the Government revenue derivable from lands. In section 1 of that Regulation it is stated:—"By the ancient law of the country, the ruling power is entitled to a certain proportion of the produce of every bigha of land (demandable in money or kind, according to local custom) unless it transfers its right thereto for a term or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public, whilst he continues to discharge the latter. As a necessary consequence of this law, if a zamindar made a grant of any part of his lands to be held exempt from payment of revenue, it was considered void from being an alienation of the dues of Government without its sanction. Had the validity of such grants been admitted, it is obvious that the revenue of Government would have been liable to gradual diminution." The Regulation was applied to Oudh after the annexation of that province.

By section 52 of Act XVII of 1876 (the Oudh Land Revenue Act, 1876), it was enacted:—

"52. All grants (whether in writing or otherwise) by proprietors, or the persons whom they represent, of land to be held exempt from the payment of rent or at a favourable rate of rent, are hereby declared to be liable to resumption, unless such grants have been sanctioned or confirmed by the Governor General in Council or the Chief Commissioner.

"Provided that, if such grants are held under a written instrument (whether executed before or after the passing of this Act) by which the grant expressly agrees that the grant shall not be resumed, they shall be held valid against him (but not as against his representatives after his death) during the continuance of the settlement of the district in which the land is situate which was current at the date of the grant."

Section 52 was subject to the procedure and exemptions contained in sections 53, 54, and 55 of that Act:

§ Section 52 of Act XVII of 1876 was wide enough to apply to grants to thekadors of land in Oudh exempt from the payment of rent or held at a favourable rate of rent, and it authorized the resumption of such grants when they had not been sanctioned or confirmed by the Governor General in Council or the Chief

Commissioner of Oudh. Sections 52, 53, 54 and 55 of Act XVII of 1876 continued in force until Act IV of 1901 was passed. By section 107E, which by Act IV of 1901 was added to Act XXII of 1886 it was enacted as follows :—

"107E. Land held rent free or at a favourable rate shall be liable to resumption, only when by the terms of the grant or by local custom it is held :—

"(a) At the pleasure of the grantor ;

"(b) For the performance of specific service, religious or secular, which the proprietor no longer requires ;

"(c) Conditionally or for a term, and the conditions are broken or the term expires "

That section limited the land which might otherwise have been resumed if section 52 of Act XVII of 1876 had remained in force, and in that respect was more favourable to the grantees of such lands than section 52 of Act XVII of 1876 had been.

By section 107A, which was one of the sections which were added to Act XXII of 1886, the proprietor of a mahal or part of a mahal was, amongst other rights of suit, given a right to sue to enhance the rent of any land held at a favourable rate of rent, whether so held by grant in writing or otherwise. And by section 107B all land in Oudh held at a favourable rate of rent was made liable to enhancement of rent unless the holder establishes certain specified facts, which have not been established in this case. That section is subject to the following proviso : " Provided that no land held under a written instrument, whether executed before or after the 1st day of January, 1902, by which the grantor expressly agrees that the grant shall not be resumed, shall be liable to resumption or assessment or enhancement of rent until the grantor dies, or the term of the current settlement of the local area in which the grant is situated expires, whichever event first occurs." In the present case not only did the grantor of the lease die before suit, but the term of the settlement current at the date of the lease, of the local area in which mauza Bandhia Kalan is situate expired before the suit was brought.

By section 107G, which is one of the sections which in 1901 were added to Act XXII of 1886, it is enacted as follows :—

"107G (1). Land not liable to resumption under section 107E and to which the provisions of section 107H do not apply shall be liable to assessment or enhancement of rent as the case may be.

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"(2). When a grant held rent free or at a favourable rate is found to be liable to have rent assessed or enhanced thereon, the grantee shall be deemed to be a tenant without a right of occupancy under sections 3, and 37 of this Act, and the rent shall be determined at such rate as the Court may consider fair and equitable, having regard to the rents paid for land of similar quality and with similar advantages in the neighbourhood.

"(3). The period of seven years for which he (the grantee) shall be entitled to retain the holding shall begin from the first day of July next following the date of the institution of the suit."

Mauza Bandhia Kalan was not liable to resumption under section 107E, as the term for which the lease was granted has not expired, and it is not proved that any condition contained in the lease has been broken. The provisions of section 107H do not apply in this case, and consequently section 107G does apply, as the lease of the 23rd of February, 1891, was a grant of land at a favourable rate of rent, and mauza Bandhia Kalan was land held by the defendant at a favourable rate of rent within the meaning of chapter VII A of Act XXII of 1886. The decree of the Board of Revenue which set aside the decree of the Commissioner of Lucknow and restored the decree or order of the Deputy Commissioner of Sitapur enhancing the rent to 2,000 rupees per annum was right.

Their Lordships will humbly advise His Majesty that the decree of the Board of Revenue should be affirmed, and that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant: *T. L. Wilson, & Co.*

Solicitor for the respondents: *Solicitor, India Office.*

APPELLATE CIVIL.

*Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada
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MUHAMMAD ILTIFAT HUSAIN (DECREE-HOLDER), v. ALIM-UN-NISSA
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*Civil Procedure Code (1908), order XXXIV, rule 6—Application for decree over
against the mortgagor—Limitation—Act No. IX of 1908 (Indian Limitation
Act), schedule I, article 181.*

An application for a decree under the provisions of order XXXIV, rule 6, of the Code of Civil Procedure is not an application for the execution of the original decree for sale, but is an application in the original suit for a new decree. Such an application is governed as to limitation by article 181 of schedule I to the Indian Limitation Act, 1908, and must be made within three years from the date when the right to apply accrued. *Bihari Lal v. Bisheshwar Dayal* (1) referred to.

THE facts of this case were as follows:—

A decree for sale on a mortgage was passed in February, 1906, the mortgaged property consisting of two villages. The mortgagee became entitled to the equity of redemption in one of the villages, with the result that the two interests, that is, the interest of the mortgagee and the interest of the mortgagor, vested in one person. The mortgage, therefore, became discharged to the extent of the value of the property acquired by the mortgagee. In the year 1911 the other village was put up to sale and purchased by the decree-holder. The sale proceeds being insufficient to satisfy the decree, the decree-holder in 1913, made an application for a personal decree under order XXXIV, rule 6, of the Code of Civil Procedure, but this proved infructuous. In 1915, the present application was made, but was dismissed as barred by limitation. The decree-holder appealed to the District Judge, but his appeal was dismissed and the order of the Subordinate Judge confirmed. The decree-holder thereupon appealed to the High Court.

Maulvi Iqbal Ahmad and Maulvi Mukhtar Ahmad, for the appellant.

* Second Appeal No. 296 of 1917, from a decree of W. T. M. Wright, District Judge of Budaun, dated the 22nd of September, 1916, confirming a decree of Kshirod Gopal Banerji, Subordinate Judge of Budaun, dated the 29th of January, 1916.

(1) (1912) 3 A. L. J., 569.

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Mr. S. A. Haidar, and Mr. Muhammad Yusuf, for the respondent.

RICHARDS, C. J., and BANERJI, J. :—This appeal arises out of an application under order XXXIV, rule 6. This rule applies to cases in which after the mortgaged property has been sold the mortgagee comes to court and asks for a personal decree for the balance left due. The rule provides that “where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the court may pass a decree for such amount. In the present case the original mortgage decree was obtained in February, 1906, the mortgage property consisted of two villages. In the events which happened the mortgagee became entitled to the equity of redemption of one of the villages, the result being that the two interests, that is, the interest of the mortgagee and the interest of the mortgagor, vested in one person. This operated to discharge the mortgage to the extent of the value of the property acquired by the mortgagee. In the year 1911 the other village was put up to sale and purchased by the decree-holder. Accordingly, the mortgaged property and all rights in respect of it were exhausted in the year 1911, and it was on this basis that the application for a personal decree was made. The application was made in the year 1915, but there was another application for a similar decree in the meantime (1913). If the present application can be regarded as an application for execution of the original mortgage decree, then perhaps the application which was made in 1913 would save limitation. If on the other hand the present application is not an application for execution of the original mortgage decree but is an application for a fresh decree, then the application should have been made within three years from the time when the right to make such application accrued, and the article which governs the application is article 181 of the Limitation Act. We find it impossible to hold that an application for a decree under the provisions of order XXXIV, rule 6, is an application for the execution of the original decree, which was a decree for the sale of certain property. We think that it is an application in the original suit for a new decree and that it

cannot be regarded as an application in execution. In a somewhat similar case—*Bihari Lal v Bisheshar Dayal* (1)—Mr. Justice CHAMIER seems to have expressed the view that article 181 governs an application for a decree under order XXXIV, rule 6. In this view the order of the court below dismissing the application was correct, although the reasons for the court's decision may be open to question. We dismiss the appeal with costs.

Appeal dismissed.

Be ore Si Henry Richards, Knight Chief Justice, and Justice Si Pramada Charan Banerji.

MUHAMMAD ILTIFAT HUSAIN (DECREE-HOLDER) v. ALIM-UN-NISSA BIBI AND OTHERS (JUDGMENT-DEBTORS).*

Civil Procedure Code (1908), order XXXIV, rule 6—Order rejecting application for a decree over against the mortgage—Appeal—Court-fee—"Decree"

An order on an application for a decree under order XXXIV, rule 6, of the Code of Civil Procedure is a "decree" as that term is defined in the Code. An appeal, therefore, from such an order must bear an *ad valorem* court fee stamp, and not merely a stamp of Rs. 2.

In the above appeal the appellant paid Rs. 2 as court fee on his memorandum appeal filed in the High Court having described it as an *execution second appeal*. The following report was thereupon made by the Stamp Reporter:—

"This is an appeal against the decree of the courts below refusing to grant the decree-holder appellant's application for a personal decree under order XXXIV, rule 6, of the Code of Civil Procedure, on the ground that it was time-barred. On the authority of the ruling of this Court to be found in *Tajammul Husain Khan v. Muhammad Husrin Khan* (2) an *ad valorem* court fee must be paid both in the lower appellate court and in this Court on the value of the relief sought. Accordingly a court fee of Rs. 295 must be paid in each court on Rs. 5,456, the value of the appeal in each court. A court fee of as. 8 having been paid in the lower appellate court and of Rs. 2 in this Court, there is therefore a deficiency of Rs. $295 \times 2 =$ Rs. 590, *minus* Rs. 2 8-0 = Rs. 587-8-0."

* Stamp Reference in S. A No. 296 of 1917.

(1) (1912) 9 A. L. J., 569

(2) (1913) 14 A. L. J., 328.

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Objection having been taken to the above report the question was referred to the Taxing Officer, who ordered the matter to be laid before the Bench hearing the appeal.

The following order was thereupon passed.

RICHARDS, C. J., and BANERJI J. :—A report has been submitted by the office that the appellant was liable for additional court fees in the lower appellate court calculated upon the value of the subject matter of the appeal. The application was for a decree under order XXXIV, rule 6, made in the original mortgage suit. The application, of course, could be made on an 8 anna stamp, but the question is what should the fee be which either side would have to pay if they were dissatisfied with the ruling of the court to which the application was made. In the present case the court made an order dismissing the application for a decree under order XXXIV, rule 6. In the case of *Tajammul Husain Khan v. Muhammad Husain Khan* (1) Mr. Justice TUDBALL held that the defendant against whom a decree under order XXXIV, rule 6, had been made was obliged to pay an *ad valorem* court fee on the decree which had been made against him. The learned Judge was of opinion that the decision appealed against was clearly a "decree" within the meaning of the Code of Civil Procedure. We think that the view taken by Mr. Justice TUDBALL was correct. The only difference between that case and the present is that the court of first instance instead of granting a decree under order XXXIV, rule 6, refused to make such decree. We think that an order refusing to make a decree under order XXXIV, rule 6, must be regarded as a "decree" within the meaning of the definition of that term in the Code of Civil Procedure. We think that the report of the office as to the liability of the appellant for payment of *ad valorem* court fees in the first appeal was correct and that the amount must be paid by the appellant.

Order accordingly.

(1)[1913] 14 A.L.J., 328.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

SURAJ BHAN (DEFENDANT) v. HASHMI BEGAM AND OTHERS
(PLAINTIFFS) AND MUHAMMAD TAWAKKUL HUSAIN
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Act No. IX of 1872 (Indian Contract Act), section 70—Sale—Specified sum left with vendees for payment to mortgagees of property other than the subject of the sale—Interest paid by purchasers in addition to specified sum—Gratuitous payment.

On the sale of certain immovable property of large value it was agreed between the parties that a specified portion of the purchase money should, instead of being paid to the vendors directly, be paid on their behalf to a certain mortgagee who held a mortgage over property of the vendors other than the subject of the sale. Owing to a delay in the registration of the sale-deed, which was caused by the action of the vendors, the purchasers did not immediately pay the stipulated sum to the mortgagee, and when they did come to tender it, the mortgagee refused to accept it upon the ground that by that time a further sum had fallen due as interest. The purchasers thereupon paid the further amount claimed. Subsequently the vendors sued the purchasers for the balance of the purchase money remaining unpaid, and the purchasers claimed to set off against the unpaid purchase money the sum which they had paid as interest, as above described.

Held that the purchasers were not entitled to the set-off claimed, as the payment of interest was in excess of the sum stipulated to be paid to the mortgagee and was in the circumstances a purely gratuitous payment.

OUT of the amount of consideration for a sale the vendors left with the vendee a sum of Rs. 8,150 for payment to a certain person in respect of a mortgage held by him over certain property of the vendors which was other than the property comprised in the sale. After the sale the vendors threw some difficulties in the way of registering the sale-deed. Eventually when the sale-deed was registered the vendee offered the Rs. 8,150 to the mortgagee, who refused to take it, on the ground that the money was insufficient, as a further sum of Rs. 749 odd had accrued due by way of interest in the meantime. It was alleged by the vendee that he paid the mortgagee this further sum of Rs. 749 as well. The vendors sued the vendee for recovery of an unpaid portion of the purchase money, and the vendee claimed

* Second Appeal No. 299 of 1916, from a decree of H. O. Allen, District Judge of Moradabad, dated the 10th of September, 1915, confirming a decree of Ram Chandra Saksena, Additional Subordinate Judge of Moradabad, dated the 29th of April, 1915.

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credit for this sum of Rs. 749. Both the courts below refused to allow the set-off claimed. The defendant vendee appealed to the High Court.

Pandit *Kailas Nath Katju* (for the Hon'ble Dr. *Tej Bahadur Sapru*), for the appellant:—

The appellant is entitled to be re-imbursed for having paid the amount in question. Section 70 of the Contract Act applies to the case. The payment was not made gratuitously, and the plaintiffs have benefited by it. In the circumstances of the case, the payment must be deemed to have been made "lawfully" within the meaning of section 70. The meaning of that expression has been explained in the case of *Chedi Lal v. Bhagwan Das* (1). It was at the express request of the vendors that the vendee was to pay, and did pay, the mortgagee the sum of Rs. 8,150, which was calculated to discharge in full the amount then due on the mortgage. There can be no question that the payment of Rs. 8,150 was a "lawful" payment. The further sum of Rs. 749 was a natural and necessary addition to the original amount, brought about by the accumulation of interest during the period of delay in making the payment. Had this delay been the fault of the appellant, the case might be different; but the plaintiffs, and not the appellant, were to blame for the delay. The payment of the additional sum of Rs. 749 by the appellant was a direct and natural corollary to his obligation to pay the Rs. 8,150. If the sale-deed had not directed the vendee to pay any sum to the creditor, and the vendee had of his own accord paid him, no doubt, that would have been a clearly gratuitous payment. Here, it is submitted, the payments of the two amounts are correlated, and they stand on the same footing. The vendors' direction to pay the sum of Rs. 8,150 justified by implication the reasonable inference that for the payment of the further necessary sum the vendee was entitled to look for compensation to the vendors, for whose benefit the payment was made. The intention of the parties obviously was that the mortgage was to be fully paid off.

The plaintiffs are seeking relief from the court, and they must do equity: see observations in the case of *Ram Tukul Singh v. Biseewar Lall Sahoo* (2)

(1) (1888) I L. R., 11 All., 234 (243). (2) (1875) L. R., 2 I. A., 181.

Dr. *S. M. Sulaiman*, for the respondents, was called upon only on the question of costs.

RICHARDS, C. J., and BANERJI, J. :—The point which arises in this appeal is as follows. Certain immovable property was sold for a considerable sum of money. In the sale-deed the consideration is stated to have been received in a certain way (as per details at the foot of the deed). According to this detail the vendee was to retain a sum of Rs. 8,150 for payment to a certain creditor of the vendors who had a mortgage upon other property belonging to the vendors, and, which was no part of the property sold to the vendee. Some delay seems to have taken place in the registration of the deed and, as a consequence, the vendee alleges that he did not pay the Rs. 8,150. Eventually, when he succeeded in getting the sale-deed registered, he went to the creditor and offered him the Rs. 8,150, which the creditor refused to receive because further interest had in the meantime accrued, amounting to the sum of Rs. 749 or thereabouts. The present suit was instituted by the plaintiffs to recover a portion of the purchase-money which they alleged had not been paid. The defendant admitted that a portion of the purchase-money had not been paid, but he claimed credit as against the amount that remained unpaid for the sum of Rs. 749 interest, which he alleged he had paid the creditor of the vendors. Both the courts below held that, assuming that the defendant had paid the creditor the extra sum of Rs. 749 for the interest which had accrued, he could not plead this as a set-off against the plaintiff's claim for the unpaid purchase-money, upon the ground that there was no obligation on the vendee to pay any money to the creditor except the Rs. 8,150 which had been left with him by the vendors. In second appeal to this Court it has been urged that the view taken by the courts below was incorrect, and section 70 of the Contract Act is relied upon. That section provides that "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore the thing so done or delivered." We do not think that this section applies to the circumstances of the present case. It was admitted at the bar

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that if the sale-deed had been silent about payment to the creditor of the vendors and that the vendee of his own motion had paid off the creditor, he could not have pleaded such payment as a set-off against the purchase money. We think that exactly the same reasoning applies to the present case. According to the sale-deed the only sum which the vendee was requested to retain out of the purchase-money and pay to the creditor was the sum of Rs. 8,150. The payment of the balance was a payment gratuitously made. We have already pointed out that the property mortgaged to secure the sum due to the creditors was no part of the property sold. It may be, of course, that the plaintiffs have benefited by the payment to the creditor, but this by itself is no sufficient ground to entitle the defendant to set it off against the plaintiff's claim. We dismiss the appeal with costs.

Appeal dismissed.

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 April, 11.

Before Mr. Justice Piggott and Mr. Justice Walsh.

PADHE SHIAM (PLAINTIFF) v. BEHARI LAL (DEFENDANT) *

Act No. IX of 1872 (Indian Contract Act), section 5—Minor—Minority successfully pleaded as a defence to a suit—Disallowance of costs—Appeal—Competence of appellate court to interfere with the discretion of the court below as to allotment of costs

Where the Judge has given his reasons and all the circumstances are before the Court of Appeal, the Court of Appeal can, if satisfied that the Judge's discretion has not been judicially exercised, interfere with it and make the order which the court below ought to have made.

It is no ground for giving costs against a successful defendant that the defendant pleaded that he was a minor at the time when the transaction upon which the suit was based was entered into, there being nothing to suggest that the plaintiff had been misled as to the real age of the defendant by any action or statement on the part of the latter.

THE plaintiff sued the defendant upon a mortgage bond, for sale of the property comprised therein. The defendant pleaded that he was a minor at the time when the bond was executed, and he succeeded in that plea. The suit was dismissed. Nevertheless, the court refused to allow the defendant his costs on the ground that the defendant was "mostly responsible for the litigation." The plaintiff appealed to the High Court against

* First Appeal No. 288 of 1915, from a decree of Gokal Prasad, Subordinate Judge of Allahabad, dated the 30th of September, 1915.

the dismissal of his suit, and the defendant filed a cross-objection on the question of the disallowance of his costs.

The Hon'ble Dr. *Tej Bahadur Sapru* (with whom were Mr *B. E. O'Connor* and Mr *Sital Prasad Ghosh*), for the appellant.

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Munshi *Gokul Prasad* and Pandit *Radha Kant Malaviya*, for the respondent

PIGGOTT and WALSH, JJ.:—This is an appeal from a decree dismissing a suit in effect by two judgments, dated respectively the 13th of September, 1915, and the 30th of September, 1915, on what were really two preliminary points. The suit was brought upon a mortgage-deed for sale of the property hypothecated in respect of a default made by the defendant at an early stage of the transaction. The plaintiff chose to shelter himself behind the legal arguments of counsel and did not go into the box, and at present there is nothing before us to show why and how the defendant was persuaded, in January, 1915, to enter into a fresh transaction at compound interest with security, in order to get rid of some comparatively recent unsecured liabilities which are not even shown to have borne compound interest. We do not know either, whether the defendant ever received a single rupee in respect of this transaction. The uncontradicted evidence of the defendant is that he did not, and the general conduct of the plaintiff raises some inference that he would not advance a rupee more than he was obliged.

Two grounds are raised in appeal against the judgments which I have mentioned: each deals really with a separate judgment. By the fourth ground of appeal it is contended that the defendant, as to whom it has been found that he was a minor, is estopped by his fraudulent misrepresentation from relying upon this defence. The law is well settled, and this point has been disposed of by the learned Subordinate Judge in an excellent judgment, in which he relies very largely upon the recent decision of the English Court of Appeal in a considered judgment of three Lords Justices in *Leslie Limited v. Sheill* (1). That decision, by the way, has been recently approved by the

(1) (1914) 3 K. B., 607.

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Privy Council—see *Mahomed Syed Ariffin v. Yeohooi Gark* (1)—in a case which was cited to us for another purpose. The learned Judge of the court below cites a passage from the judgment of Mr. Justice A. T. LAWRENCE, who was then sitting in the Court of Appeal, to the following effect:—"Wherever the infant requires, as a plaintiff, the assistance of any court, it will be refused until he has made good his fraudulent representation. Wherever the infant is still in possession of any property which he has obtained by his fraud he will be made to restore it to its former owner." So far Mr. Justice LAWRENCE was giving expression to the equitable principle recognized in England and adopted in the case relied upon by Dr. *Sapru, Jagar Nath Singh v. Latta Prasad* (2). "But", continues Mr. Justice LAWRENCE, "I think that it is incorrect to say that he can be made to repay money which he has spent merely because he received it under a contract induced by his fraud." And that was in substance the decision of the Court of Appeal which has been consistently followed by the courts in India. The contention as to the legal proposition therefore fails, and we agree with the judgment of the court below on this point. We desire, however, to add, lest it should be supposed that this decision conveys any reflection upon the defendant, that not only has no fraudulent representation been found against the defendant, but it has not even been alleged. There is a faint suggestion in paragraph (c) of the reply which the plaintiff made to the written statement where the defendant set up his minority, at page 9 of the printed book, which suggests that the defendant put forward some active misrepresentation with regard to his age in the form of a document. It is not alleged that that was done fraudulently, and, applying the principle which has always been applied by Courts of Justice in a case of this kind, this point really ought not to have been allowed to have been argued by the plaintiff at all. The plaintiff, as we have said, was not called, and there is no suggestion from first to last by any positive evidence of any active misrepresentation by the defendant before the contract was entered into. Further than that, it would be necessary for the plaintiff to establish that he was induced by such misrepresentation, if in

(1) (1916) 2 A. C., 575, 582.

(2) (1908) 1 L. R., 31 All., 21.

fact it had been made. One's experience of these cases in courts is that persons who carry on money-lending business, like the present plaintiff, and enter into similar transactions, are not as a rule so much influenced by the statements of their respective debtors as by a desire to get inexperienced young men into their clutches and to make as much profit out of them as the Law will permit, or as the fear of criminal charges, or other consequences of that kind, may prevent the debtors from resisting. As we have already said, we are inclined to think that the plaintiff himself entertained grave doubts as to the age of the defendant, and therefore it is unlikely that he was influenced by anything the defendant had said to him. So much for the point raised in the fourth ground of appeal, which is dealt with in the latter of the two judgments.

With regard to the other point, namely, the judgment of the 13th of September, 1915, on the pure question of fact as to the actual age of the defendant one really cannot improve upon the able and careful analysis of the evidence contained in the judgment itself. Out of respect to the arguments addressed to us, however, we will add this. It seems to us that the evidence with regard to the defendant's actual age is overwhelming. The best evidence, of course, is the evidence of a minor's parents. In this case the mother was dead, but it so happened that she made an application in 1900 with reference to her child, who, if the rest of the evidence be believed, had been born only three years before. It is almost impossible that she could have been mistaken at that time, and no reason of any kind is suggested why she should have desired to mislead anybody. The sister, who was a *parda-nashin* lady and was called on commission, gave strong and clear evidence, which we have no reason to suppose to be dishonest and which was not shaken by a long and determined cross-examination. The brother's evidence is much to the same effect. In the result the family evidence in this case is peculiarly strong and clear. It is therefore unnecessary to say anything about the weight or admissibility of horoscopes and other matters of that kind which have been much discussed. As against such evidence as exists in this case, expert evidence, horoscopes and medical certificates are of very little, if any, value. In this case they are in our opinion

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of no value whatever. The appeal fails on both grounds and must be dismissed with costs.

The matter, however, does not rest there. There is a cross-objection by the defendant upon the ground that he has been deprived of his costs. We agree with Dr. Saprú that this is a matter for the discretion of the trial court. At one time it was thought that a Court of Appeal would never interfere with the exercise of such discretion, but where the Judge has given his reasons and all the circumstances are before the Court of Appeal, it is now settled that the Court of Appeal can, if satisfied that the discretion has not been judicially exercised, interfere with it and make the order which the court below ought to have made. We think that there was really no evidence to support a finding that the defendant was "mostly responsible for this litigation." The presumption usually is that a plaintiff is responsible for a suit which he has brought into court. In this case the plaintiff was in a peculiar hurry to bring the case into the court. We cannot agree with the ground upon which the learned Subordinate Judge has proceeded. It has been held by the English Court of Appeal that the mere fact that a defendant relies upon a right which a Statute gives him is not a sufficient ground for depriving him of his costs. Some people think that in the ordinary sense of the word it is a shabby thing to rely upon a Statute of limitation, or the Gaming Act, or a defence of infancy, but it has been distinctly held that neither of those matters is good ground for depriving a defendant of his costs. In the case which was relied upon by the appellant and was referred to in argument [*Leslie Limited v. Sheill* (1)] the defendant was deprived of his costs, even of that part of the suit on which he succeeded. He had been found guilty by a jury of fraudulently deceiving the money-lender. There is nothing of that kind in this case. The plaintiff has chosen to come into court with a hopeless case. The defendant has succeeded in establishing a legal defence. We see no reason why the costs should not follow the result.

The appeal is dismissed with costs and the cross-objections are allowed. We modify the decree of the court below by allowing the defendant his costs throughout.

Appeal dismissed.

REVISIONAL CRIMINAL.

1918
April, 1918.*Before Justice S. P. Amada Chandra I. J.*

EMPEROR v. RAM DAS AND OTHERS *

*Act (Local) No. IV of 1910 (United Provinces Excise Act) section 64(c)—**Breach of conditions of licence—Breach committed by servant—Responsibility of master.*

In order to establish an offence under section 64(c) of the United Provinces Excise Act, 1910, against a licence-holder in respect of the alleged keeping of incorrect accounts by a servant, it must be shown that the licence-holder himself allowed the offence to be committed by his servant, or was cognizant of what his servant was doing.

Two holders of a licence for the sale of liquor and their salesman were convicted of an offence under section 64(c) of the United Provinces Excise Act, 1910, for a breach of one of the conditions of the licence, namely, that an account of sales made should be kept in a prescribed form. It was alleged that the accounts, which were actually kept by the third accused, the salesman, were not correct. The case was referred to the High Court by the Sessions Judge of Cawnpore with the recommendation that the convictions and sentences should be set aside, inasmuch as the use of the word 'wilfully' in section 64 implied that, if the breach were committed by a servant, the master must be in some way privy to or cognizant of it before he could be convicted. The learned Sessions Judge was also of opinion that the conviction of the salesman could not stand, because he had kept accounts of some sort, though they might not have been strictly accurate accounts.

The parties were not represented.

BANERJI, J.—The three accused in this case have been convicted under section 64(c) of the United Provinces Excise Act, No. IV of 1910. The first two accused are the holders of a licence for the sale of liquor. The third accused Kallu is their salesman. One of the conditions of the licence was that an account of sales made shall be kept in a prescribed form. The charge against the accused was that they had not kept correct accounts and that they had thus committed a breach of condition 9 of the licence. Section 64 provides that "Whoever being the holder of a licence or being in the employment of such holder

*Criminal Reference No. 226 of 1918.

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and acting on his behalf, *wilfully does* or omits to do anything in breach of any of the conditions of the licence, shall be punished for each such offence with fine." As regards the first two accused they would be guilty under the section if they wilfully did or omitted to do anything in breach of any of the conditions of their licence. The use of the word "wilfully" clearly shows that it must be shown that they themselves allowed the breach to be committed by their servant or were cognizant of what their servant was doing. The learned Sessions Judge therefore was, in my opinion, right in the view that these men could not be legally convicted under the section. The Magistrate who convicted them referred to the case of *Emperor v. Babu Lal* (1). That was a case under the Opium Act, the provisions of which were different from those of the Act in question in the present case. Reference was made in that judgment to the unreported case of *Queen-Empress v. Ram Kishen* (2), decided on the 26th of February, 1890. That was a case under section 42 of Act No. XXII of 1881, the provisions of which were different from those of the present Act. The use of the word "wilfully" seems to me clearly to show that in the case of the accused it must be proved that they had intention or knowledge. As for Kallu, who is said to have altered a page of the register, it seems that the original page, according to the finding of the court below, did not contain an incorrect entry. I have considerable hesitation in agreeing with the learned Sessions Judge that the word "accounts" does not mean correct and proper accounts, but even on that construction it can hardly be held, in view of the lower court's finding, that the accounts were not correctly kept.

Under these circumstances the conviction of the three accused was not justified. I accordingly set aside the convictions and sentences and direct that the fines, if paid, be refunded.

Convictions set aside.

(1) (1912) I. L. R., 34 All., 319.

(2) (1890) Criminal Reference No. 69 of 1890.

Before Justice Sir George K. C.
EMPEROR v. KARIM UD-DIN.*

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 April, 18.

Act No. XLV of 1860 (Indian Penal Code), section 408—Fiduciary character of clerk or servant—Misjointing of charges.

A station master on the East Indian Railway, under an arrangement with the Company, received a fixed allowance in respect of the marking, loading and unloading work at his station and used to employ his own men for that purpose. One of such men, engaged as a mark man, was entrusted with the duty of keeping certain registers, which it was the duty of the station master to maintain, and next allowed to receive cash payments and to enter the same in the cash register. Whilst so employed, he received a sum of Rs. 5-0-0 as an over-charge or demurrage in respect of certain goods which passed through his hands, and appropriated the same. To this sum, however, the Railway Company made no claim. He was also alleged to have received and appropriated to his own use two other sums of money under somewhat similar circumstances. In respect of these three sums he was tried and convicted on three counts under section 408 of the Indian Penal Code.

Held, the offence, if any, committed with regard to the sum of Rs. 5-10 did not fall within section 408 at all, and, this being so, the joining of the three charges in one trial was illegal.

THE facts of this case were as follows :—

One Raghunath Prasad, station master of Sirathu station on the East Indian Railway, had entered into an arrangement with the Railway authorities, under which he employed his own men to do the marking, loading and unloading work at the station. The station master got a certain allowance for the performance of this work, and himself paid the men engaged by him. The accused Karim-ud-din had been engaged by him as a marksman, whose duties were to mark the packages received at the station. Raghunath Prasad, however, got or allowed Karim-ud-din to write certain registers which the station master should have kept himself. Raghunath Prasad went on leave and was succeeded by Rikhi Lal, who allowed Karim-ud-din to receive the cash payments and to make the entries in the cash register. It did not appear that the Railway authorities had ever sanctioned, or were even aware of, this state of things.

The allegation against Karim-ud-din was that he demanded an over-charge of Rs. 5-10-0 from one Babu Lal, in respect of goods consigned and appropriated the money himself, and that he also misappropriated two other sums received by him from other

* Criminal Revision No. 85 of 1918, from an order of F. D. Simpson Sessions Judge of Allahabad, dated the 22nd of December, 1917.

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consignees of goods. He was charged with three offences under section 408 of the Indian Penal Code in respect of these three sums and was tried at one trial for them. He was convicted and sentenced to six months' rigorous imprisonment on each count. On appeal, the Sessions Judge affirmed the conviction, but reduced the sentence to four months on each count. The accused applied in revision to the High Court.

Babu Piari Lal Banerji, for the applicant :—

The charge with respect to the first item of Rs. 5-10-0 could not possibly constitute an offence under section 408 of the Indian Penal Code. The money which Babu Lal, the consignee, was made to pay, over and above the correct amount due, was not money due to the Railway Company. The Railway Company denied Babu Lal's liability to pay the excess demanded, and repudiated the demand and the realization made by the accused. The money, therefore, was not money belonging to or due to the Railway Company, nor had it ever come into their hands. It could not, therefore, be said that the accused was entrusted with the money and that he misappropriated it. The case of *Queen-Empress v. Imdad Khan* (1) is instructive in connection with this point. The offence, if any, in respect of the first item, was that of cheating and it was brought in under section 408, Indian Penal Code, to allow of a joint trial. The trial was, therefore, illegal. Further, the accused was merely a servant of Raghunath Prasad or of Rikhi Lal, and was not a "clerk or servant" of the Railway Company, nor was he "entrusted in such capacity" with property; consequently, he could not be convicted under section 408 of the Indian Penal Code. The Railway Company had never authorized the entrusting of cash to the accused.

The Assistant Government Advocate (Mr. R. Malcomson), for the Crown :—

Although the Railway Company may not have actually engaged the accused as its servant, he was, in actual fact, acting in that capacity and using his position as such servant to obtain the money. Having chosen to take upon himself the position and responsibilities of a clerk of the Railway Company, and as such to get hold of the money, he cannot repudiate that position.

He received the excess amount on behalf of the Railway Company and he is accountable to the Company for it. His appropriation of the money to his own use is, therefore, criminal misappropriation. He cannot be allowed to say that, notwithstanding his actual performance of the duties and responsibilities of a clerk in the employment of the Railway, and the recognition by the general public of such performance, he was in reality not such a clerk, as he had not been duly appointed. I rely on the case of *Queen-Empress v. Parmeshur Dutt* (1).

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Babu Piarī Lal Banerji, in reply :—

That case deals with a "public servant," which expression is specially defined in section 21 of the Indian Penal Code, and expressly includes every person "who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation."

KNOX, J.—Karim-ud-din has been convicted of three offences, each offence under section 403 of the Indian Penal Code, and has been sentenced to six months' rigorous imprisonment on each offence, the sentences to run consecutively. It appears from the record and the arguments addressed to me that station masters on the East Indian Railway get some kind of allowance from the Railway in return for goods despatched by the Railway to be marked and loaded or otherwise handled. The station master Raghunath Prasad appointed Karim-ud-din and gave him Rs. 10 a month for doing this work. There was no contract of any kind between the East Indian Railway Company and Karim-ud-din. Raghunath Prasad appears to have made or permitted Karim-ud-din to write a number of Railway registers. It is not for a moment asserted that the East Indian Railway Company sanctioned this allotment of work to Karim-ud-din or were in any way cognizant of it. Raghunath Prasad took leave and was succeeded by one Rikhi Lal. Rikhi Lal appears to have gone a step further than Raghunath Prasad in employing Karim-ud-din on this kind of work and to have given him the cash registers to write up. The result, or alleged result, of these proceedings was that certain items of money disappeared. The accused was charged with embezzling three separate different items. The nature of these

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items is somewhat different. The first item is an item of Rs. 5-10-0. The prosecution allege that this was an over-charge upon certain goods consigned through the East Indian Railway to one Sat Narain. Sat Narain appears to have paid the sum under protest, and to have written to the Railway Company on the point. The item was represented in a letter, the writing of which is traced to the accused, but the signature on the writing is that of Rukhi Lal. The money never came into the hands of the East Indian Railway Company. It was described as a demurrage charge, while I understand that the Railway have never put it forward as money due to them either on account of goods consigned or of demurrage thereon. The other two items are of the same description, but for the purpose of this revision I need not go into them. The contention raised before me is that with reference to the first item no offence coming within section 408 of the Indian Penal Code has been proved and the trial of the accused for the three offences under section 408 of the Indian Penal Code is illegal, a joint trial of the three items not being allowable by law. It is really round this first charge that the argument in revision centres. I accept the plea that, even if the facts be considered proved, the first is not an offence which falls within section 408 of the Indian Penal Code. Karim ud din was neither clerk nor servant of the Railway Company, he was not employed as a clerk or servant of theirs, and not being so he could not be entrusted in such capacity with this sum of Rs. 5-10-0. It is contended before me that Karim-ud-din having chosen to take upon himself the duties and responsibilities of a clerk of the East Indian Railway Company, must be regarded as a clerk and cannot afterwards say that he is not such a clerk, and my attention was called to the case of *Queen-Empress v. Parmeshar Dat* (1). There is, however, an important difference in the case cited and the present case. Parmeshar Dat was recognized by the authorities as filling the position of a public servant. There was no such recognition in this case, nor can I suppose that there would ever have been such a recognition. The probabilities are that, if the attention of the East Indian Railway Company had been called to the fact that this marksman was posting up registers and receiving moneys,

they would have utterly refused to recognize him and would have called Rukhi Lal to account for such an irregularity. Then further, my attention was called to what was argued, how far the sum of Rs. 5-10-0 taken under the circumstances stated would come at all under the crime of embezzlement. It was not property of the East Indian Railway Company; it was repudiated as not being their property, and whatever may have been the offence committed in respect of that Rs. 5-10-0 it was not the offence of embezzlement. The joint trial under the circumstances was illegal. I quash it and set aside the convictions and sentences. Karim-ud-din must be released.

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Conviction set aside

Before Mr. Justice Piggott.

EMPEROR v. AMIR HASAN KHAN *

Act (Local) No. II of 1916 (*United Provinces Municipalities Act*), section 307—Disobedience to notices lawfully issued by a Municipal Board—Recurring fine—Procedure necessary to imposition of daily fine

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A Magistrate convicting an accused person of an offence under section 307(b) of the United Provinces Municipalities Act, 1916, cannot, by the same order, further sentence him to a recurring fine in the event of non-compliance with the order of the Board.

The liability to a daily fine in the event of a continuing breach has been imposed by the Legislature in order that a person contumaciously disobeying an order lawfully issued by a Municipal Board may not claim to have purged his offence once and for all by payment of the fine imposed upon him for neglect or refusal to comply with the said order. The liability will require to be enforced, as often as the Municipal Board may consider necessary, by the institution of a second prosecution, in which the questions for consideration will be, how many days have elapsed from the date of the first conviction under the same section during which the offender is proved to have persisted in the offence, and, secondly, the appropriate amount of daily fine to be imposed under the circumstances of the case, subject to the maximum prescribed.

THIS was a reference made by the Sessions Judge of Cawnpore.

The facts of the case are fully set forth in the judgment of the Court.

Babu Sital Prasad Ghosh, for the applicant.

The Assistant Government Advocate (Mr R. Malcomson), for the Crown.

PIGGOTT, J.—The learned Sessions Judge of Cawnpore has referred to this Court in revision two orders passed by a Magistrate

* Criminal Reference No. 186 of 1918.

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of the first class subordinate to him in connection with certain prolonged proceedings which have been going on between the Municipal Board of Fatchpur and a gentleman of the name of Munshi Amir Hasan Khan, who, I understand, is a member of the legal profession for something more than one and a half years past. On the 8th of January, 1917, it was proved against the said Amir Hasan Khan that he had failed to comply with a notice directing him to execute a certain work in respect of certain property, namely, a drain, about which there was some contention between him and the Municipal Board. Under section 307, clause (b), of the United Provinces Municipalities Act, which came into force on the 1st of July, 1916, Munshi Amir Hasan Khan was liable to a fine which might extend to Rs. 500, and in case of a continuing breach, he was liable to a further fine which might extend to Rs. 5 for every day after the date of the first conviction during which it might be proved against him that he had persisted in the offence. The trying Magistrate imposed the almost nominal fine of Rs. 5; but instead of contenting himself with warning the accused of the further liability which would attach to him from the date of this conviction, he purported by this very order of the 8th of January, 1917, to direct Munshi Amir Hasan Khan to pay a further fine of Re. 1 per diem from the 9th of January, 1917, until the notice issued by the Municipal Board in respect of the drain in question should be satisfactorily complied with. As the learned Sessions Judge has pointed out, the latter portion of this order is illegal. The liability to a daily fine in the event of a continuing breach has been imposed by the Legislature in order that a person contumaciously disobeying an order lawfully issued by a Municipal Board may not claim to have purged his offence once and for all by payment of the fine imposed upon him for neglect or refusal to comply with the said order. The liability will require to be enforced, as often as the Municipal Board may consider necessary, by institution of a second prosecution, in which the questions for consideration will be, how many days have elapsed from the date of the first conviction under the same section during which the offender is proved to have persisted in the offence, and, secondly, the appropriate amount of the daily fine to be imposed under the circumstances of the case, subject to the prescribed maximum of Rs. 5 per

diem. To begin with, therefore, I must accept the reference of the learned Sessions Judge with regard to the order of the 8th of January, 1917. The following words will be deleted from the said order, namely, "and also from to-morrow to a further fine of Rs. 1 per diem till the arch in question is removed."

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The next question which I have to consider is an order passed by the same Magistrate on the 23rd of November, 1917. The matter was laid before this Magistrate in the form of a simple application asking him to enforce that portion of the order of the 8th of January, 1917, which I have felt it my duty to set aside. The Magistrate has as a matter of fact inquired into one of the two questions which I have suggested above as essential in the event of a further prosecution in respect of a continuing breach. He has considered carefully how many days had elapsed since the order of the 8th of January, 1917, during which Munshi Amir Hasan Khan was proved to have persisted in his disobedience to the order of the Municipal Board. He has not, however, made any attempt to form an independent opinion as to the gravity of the offence committed, as to the excuses which might be offered (and which apparently were offered) for the conduct of the accused, and as to the amount of the daily fine the imposition of which would satisfy the ends of justice. I am gratified to find, and it is one of the few circumstances in connection with my examination of this record which is calculated to afford any satisfaction, that the Magistrate has come to the conclusion that compliance has now been made with the notice issued by the Municipal Board: he has held that such compliance was made, according to one part of his order, on the 7th of September, 1917, but according to another part of the same order, on the 17th of September, 1917. Further, I find that Munshi Amir Hasan Khan has admitted liability to a certain extent. He has made practical acknowledgment of his error by paying a sum of Rs. 139 in the way of a fine for his continuing breach of the notice issued to him. It is quite possible that, if the Magistrate who inquired into this matter had felt himself at liberty to exercise his discretion in the same, he might have fixed the amount of the daily fine at a sum which would have made this payment of Rs. 139 sufficient to clear the accused person from liability. While, therefore, I should have been

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reluctant to interfere upon a merely technical ground with the proceedings resulting in the order of the 23rd of November, 1917, had I thought that everything which an accused person in a proceeding taken in respect of a continuing breach under section 307, clause (b), of the Local Municipalities Act, was entitled to have inquired into and considered had been as a matter of fact so inquired into and taken into consideration by the Magistrate, I think that this order of the 23rd of November, 1917 is open to objection in substance as well as in form. I set it aside accordingly. The sum of Rs 102 required under the terms of this order to be paid by the accused Munshi Amir Hasan Khan, if paid, will be refunded

It will be observed that, while accepting the rest of the reference made by the learned Sessions Judge, I have passed no order directing any refund in respect of the sum of Rs 139 paid by Munshi Amir Hasan Khan prior to the order of the 23rd of November, 1917. No doubt that payment was actually made in compliance with that portion of the order of the 8th of January, 1917, which I have set aside as inoperative; but a liability to a fine for a continuing breach attached to Munshi Amir Hasan Khan under the provisions of the statute itself, independently altogether of the above order. He has virtually assessed his own liability at Rs. 139, and I can see no reason why this should not be accepted. At any rate I pass no order of re-payment in respect of this sum of Rs. 139. Let the record be returned,

Record returned.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball
 CHABRAJ SINGH AND OTHERS (PLAINTIFFS) v. MAHESH NARAIN
 SINGH AND OTHERS (DEFENDANTS).*

Pre-emption—Purchases made by vendee on different dates—Suit to pre-empt first sale only—Vendee claiming to be co-sharer in virtue of second purchase—Suit not maintainable.

The defendant purchased shares in a village on two different dates. The plaintiff sued to pre-empt the earlier sale, but no suit was brought

* Second Appeal No. 1629 of 1917, from a decree of Shekhar Nath Banerji, Sessions Judge of Jaunpur, dated the 31st of July, 1917, confirming

in respect of the second sale. *Held* that the suit was not maintainable.

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ONE Kuber Singh sold to Mahesh Narain Singh his share in a certain village by three sale-deeds, dated the 11th of November, 1913, the 27th of November, 1913, and the third in January, 1914. For the purposes of this report the third sale is not material. The sale of the 27th of November, 1913 related to the largest share. The plaintiffs claimed to pre-empt the share sold on the 11th of November, 1913, but not the share sold on the 27th of November, 1913. The suit relating to the first sale was filed on the 12th of December, 1913, in the court of the Munsif, who dismissed it on the 31st of August, 1914, on the ground that the plaintiffs could not prove either a custom or a contract of pre-emption. The plaintiffs appealed. The Additional Subordinate Judge, on the 24th of July, 1915, allowed the appeal and held that a contract of pre-emption had been proved and remanded the case for trial on the merits. The case came to the Munsif for trial who on the 28th of April, 1916, again decided against the plaintiffs on the ground that no suit having been filed about the second sale, and the time for filing such suit having expired, the defendant vendee became a co sharer in the village and therefore the suit relating to the first sale must fail. This decree of the Munsif was confirmed in appeal. The plaintiffs appealed to the High Court.

Babu *Akhilnath Sanyal*, for the appellants :—

The vendor deliberately sold his share on different dates to put the plaintiffs off the track and prevent inquiry by them. The appellants had no knowledge of the second sale. The defendant vendee should have stated in his defence that he had become a co-sharer by the purchase of the 27th of November, 1913. The plaintiffs could then have known about this sale and could have brought a suit for pre-emption. According to the trend of rulings of this Court the defendant vendee could not be considered a co-sharer in the village. He had a defeasible right. On the 31st of August, 1914, when the Munsif decided against the plaintiffs, one year from the date of the second sale had not expired. A suit could have been brought to pre-empt that sale and therefore the title of the defendant vendee was not then complete. If

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follows therefore that on the 31st of August, 1914, when a decree ought to have been passed in plaintiffs' favour, their right to pre-empt could not have been defeated on the plea that the defendant vendee had become a co-sharer; *Rohan Singh v. Babu Lal* (1). This Court has all along held that, so long as the period for instituting a suit for pre-emption has not expired a vendee cannot be considered a co-sharer for the purpose of a pre-emption suit. In the present case on the 31st of August, 1914, the time to bring the pre-emption suit had not expired; *Kaleshar Rai v. Nabilan Bibi* (2).* The defendant vendee should have said in his defence that he had become a co-sharer as soon as he purchased, and, not having done so, he cannot take advantage of this plea.

RICHARDS, C.J., and TUDBALL, J.:—It appears from the finding of the court below that the vendee had become a co-sharer by purchase on the 27th of November, 1913, that is to say, before the present suit was instituted. No suit for pre-emption was ever instituted in respect of this second purchase. The result is that not only on the day upon which the court of first instance might have made its decree in favour of the plaintiff, but even before the institution of the suit, the defendant vendee had become a co-sharer. It may be unfortunate that this matter was not gone into by the court in the first instance, which might have had the effect of giving the plaintiff express notice of the sale of the 27th of November, 1913 (which the learned vakil says he was ignorant of). This may have been an unfortunate circumstance for the plaintiff and a lucky one for the defendant vendee, but the fact remains that when the case was tried the vendee was able to prove that he was a co-sharer with the vendor before the date of the institution of the suit. In this view the decree of the court below was correct. We dismiss the appeal.

Appeal dismissed.

*[*Notes*.—The decision was affirmed in Letters Patent Appeal—See 4 A. L. J., 351—*Ed.*]

(1) (1909) 1 L.R., 31 All., 530.

(2) (1906) 1 L.R., 28 All., 42.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Chaman Banerji.

NAULAKHI KUNWAR AND OTHERS (DEFENDANTS) v. JAI KISHAN SINGH (PLAINTIFF).*

1918
April, 20.

Hindu law—Gift—Gift to a Hindu female—Construction of document
—“*Malik mustaqil*.”

A Hindu, being the full owner of certain property, made a gift thereof to his widowed daughter-in-law, describing the donee in the deed as *malik mustaqil*. There was no circumstance to counter-indicate that the donor intended that the donee should take less than the full estate in the property comprised in the deed.

Held, that the donee took all the estate of the donor. *Surajmani v. Rabi Nath Ojha* (1) referred to.

THE facts of this case, shortly stated, were as follows:—

The plaintiff sought for a declaration that a deed of gift executed by Musammat Naulakhi Kunwar in favour of the other defendants was null and void after her death, because, if she took anything under the deed of gift in her own favour executed by her father-in-law, Dirgaj Singh, it was only a life interest. He further alleged that his father and Dirgaj Singh were joint. The defence was that the plaintiff's father and Dirgaj were separate and that Musammat Naulakhi had taken an absolute estate under the deed of gift and was competent to make the gift in question. Both the courts below held that the family was not joint, but while the Subordinate Judge held that Musammat Naulakhi Kunwar took an absolute estate, the District Judge decreed plaintiff's suit on the ground that Dirgaj Singh was unaware of the introduction of the words “*malik mustaqil*” in the deeds of gift or he was unaware of their true significance, and that at any rate he never intended to convey an absolute estate to his widowed daughter-in-law. The defendants appealed.

Babu *Surendra Nath Gupta* (for Dr. *Surendra Nath Sen*), for the appellants:—

The learned District Judge has made out an entirely new case for the plaintiff. In construing the terms of a deed the question

* Second Appeal No. 710 of 1916, from a decree of H. B. P. Rose, District Judge of Azamgarh, dated the 28th of February, 1916, reversing a decree of Suraj Narain Majju, Subordinate Judge of Azamgarh, dated the 17th of December, 1915.

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is not what the parties may possibly have intended, but what is the meaning of the words they had used; *Manindra Chandru Nandi v. Durga Prasad Singh* (1). Whenever the word "*malik*" is used in a deed of gift or will, the donee or devisee, whether he is a male or female, always gets an absolute heritable and alienable estate, unless there is something in the document to qualify the same, and that inasmuch as no restrictions had been imposed upon the donee's power of alienation, the word "*malik*," which in this case is further strengthened by the use of the word "*mustaqil*" is to be given its natural significance; *Surajmani v. Rabi Nath Ojha* (2). The same rule of construction has been laid down in *Padam Lall v. Tek Singh* (3) and *Thakur Prasad v. Jumna Kunwar* (4). The mere use of the word "maintenance" cannot take away from the absolute nature of the grant, in the absence of anything qualifying and restricting, the grantee's powers of disposition over the property.

Babu *Lalit Mohan Banerji* (with him the Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *J. M. Banerji*), for the respondent, supported the judgment of the lower appellate court and contended that according to the ordinary notions and wishes of Hindus with respect to the devolution of property, it was proper to assume that there was always a desire in their minds that an estate, especially ancestral estate, should be retained in the family, and as a general rule, women would not take absolute estate of inheritance which they could alienate.

Babu *Surendra Nath Gupta* was not heard in reply.

RICHARDS, C. J., and BANERJI, J.:—This appeal arises out of a suit brought by the plaintiff for a declaration of his title to certain property. On the findings the only question which is open to consideration is whether or not Musammat Naulakhi Kunwar took an absolute estate under a deed of gift executed by one Dirgaj Singh. The court of first instance dismissed the plaintiff's suit. The lower appellate court held that on the true construction of the deed of gift, the lady took only a life-estate. Under the terms of the deed the lady is made absolute owner. The words used are "*malik mustaqil*." Their Lordships of the

(1) (1917) 15 A. L. J., 432.

(3) (1906) 4 A. L. J., 68.

(2) (1907) I. L. R., 30 All., 84.

(4) (1909) I. L. R., 31 All., 308.

Privy Council held in the case of *Surajmani v. Rabi Nath Ojha* (1) that the word "*malik*" alone, unless there were something definite to the contrary in the surrounding circumstances to qualify the meaning of the expression, indicates an absolute estate. Here we have the word "*malik*" followed by the word "*mustaqil*" which even makes it stronger. The learned District Judge seems to have treated Durgaj Singh as if he had been a *parda-nashin* lady. He says that Durgaj Singh may not have been aware of the meaning of the expression *malik mustaqil*. We cannot agree with this line of reasoning. The grant should be construed rather in favour of the grantee than of the grantor. Admittedly Durgaj Singh had sufficient estate in him to enable him to make a full grant to the Musammat. There are absolutely no surrounding circumstances to indicate that the donor wished the lady to take mere life-estate. He does not say in the deed that she is to have it only for her life, nor does he even say that she is to have no power of alienation. We think that the learned District Judge was wrong in the view that he took of the construction of the deed of gift. The result is that we allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance with costs in all courts.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Justice Sir George Knox

EMPEROR v. SAHDEO RAI *

Act No XLV of 1830 (Indian Penal Code), section 173—Summons—Refusal to receive summons when tendered no offence.

Under the Code of Criminal Procedure the mere tender to a person of a summons is sufficient, and a refusal by him to receive it does not constitute the offence of intentionally preventing service thereof on himself under section 173 of the Indian Penal Code.

THE parties were not represented.

The facts of this case are stated as follows in the order of reference by the Sessions Judge :—

"This is an application for revision of an order, dated the 7th of February, 1918, of Maulvi Muhammad Wajib, Magistrate, 1st

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(1) (1907) I. L. R., 30 All., 84.

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class, of Ballia, who convicted Sahdeo Rai under section 173 of the Indian Penal Code, and sentenced him to pay a fine of Rs. 10, on the ground that on the 10th of December, 1917 he had refused to take the notice which Mahadeo Ram constable wanted to serve on him. In the Deputy Magistrate's opinion this act of Sahdeo Rai amounted to intentional prevention of service on himself. It seems to me that this is not the object of section 173, Indian Penal Code. The refusal to receive a summons is not an offence under section 173, if the actual delivery was not legally necessary to complete its service. Under the Criminal Procedure Code the mere tender of a summons is sufficient and a refusal to receive does not expose one to the penalty of section 173; *Queen v. Punamalai Nadan* (1). I cannot agree with the Deputy Magistrate that the accused intentionally prevented the service of the notice on himself by refusing to receive it. The Deputy Magistrate seems to have misconceived the scope of section 173. I would, therefore, report this case under section 438, Criminal Procedure Code, to the Hon'ble High Court with the recommendation that the order of the Deputy Magistrate above referred to be set aside as illegal and that the applicant be acquitted of the offence under section 173. The fine, if already paid, may also be ordered to be refunded to the applicant. Before the record is submitted to the High Court the Magistrate will be asked to furnish an explanation."

KNOX, J.—The reference made has been properly made. No offence under section 173 of the Indian Penal Code has been committed. I set aside the conviction and direct that the fine, or any part of it which has been paid, be refunded. The sentence of imprisonment has been served.

Reference accepted.

(1) (1882) I. L. R., 5 Mad, 199.

REVISIONAL CIVIL.

*Before Sir Henry Richard, Knight, Chief Justice, and Justice Sir Pramada
Chaudhary, J.*

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SAJJADI BEGAM (PLAINTIFF) v. DILAWAR HUSAIN AND
OTHERS (DEFENDANTS) *

Decree—Conditional decree ordering a plaintiff to make a payment within a specified time—Court not competent to extend time limited—Civil Procedure Code (1908), section 114—Review of judgment—Jurisdiction

Except in the case of mortgages decrees, where a court by its decree orders a party to make a payment, or take certain action within a specified time and provides that certain detrimental consequences shall follow in the event of non-compliance with its order, the Court itself has no jurisdiction to extend the time limited by the decree, save on an application for review under section 114 read with order XLVII, rule 1, of the Code of Civil Procedure. *Nair Ram v. Bhagwan Chand* (1) overruled.

THE facts of this case were as follows:—

The plaintiff brought a suit for dower and for cancellation of two deeds. One of the objections raised by the defendants was that the court fee paid on the plaint was insufficient, inasmuch as no court fee had been paid in respect of the prayer for cancellation of the two deeds. The court framed an issue on this point and decided thereon that the plaintiff should pay an additional court fee of Rs. 20. The suit was decreed in respect of the dower and the cancellation of one of the two deeds. There was a condition embodied in the decree that the plaintiff was to pay up within a week the deficiency of Rs. 20 in the court fees, and that in default thereof the suit would stand dismissed with costs. Rs. 10 only was paid on behalf of the plaintiff within the time fixed. Shortly after the expiry of the week the defendants applied for execution of the decree, claiming that by reason of the condition not having been fulfilled the suit stood dismissed with costs, and consequently they were entitled to execute the decree for costs. Notice of this application was issued to the plaintiff. Thereafter the plaintiff made an application stating that she had not been informed that the requisite amount was Rs. 20, and praying for an extension of time under section 143 of the Code of Civil Procedure in order to enable her to pay in the remaining amount of the court fee. The court doubted whether it had any

* Civil Revision No. 136 of 1917.

(1) (1917) 15 A. L. J., 511.

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power under section 148 to extend the time, and further held that no sufficient grounds had been made out by the plaintiff for extending the time, even if it could be extended. The plaintiff's application was accordingly dismissed. Hence this application for revision.

Maulvi *Iqbal Ahmad* (for Mr. *Muhammad Yusuf*), for the applicant, submitted that the court below had jurisdiction to extend the time in this case. He relied on the ruling in *Naik Ram v. Bhagwan Chand* (1). He further submitted that having regard to the circumstances of the case this was a matter in which the court should have properly exercised its discretion in favour of the applicant and granted her extension of time.

Mr. *S. A. Haidar*, for the opposite party, submitted that the case cited by the applicant went against a long series of cases decided by the pre-emption Bench and the principle underlying those decisions governed the facts of the present case as well. The court would have to modify its decree if it granted an extension of time.

Maulvi *Iqbal Ahmad* replied.

RICHARDS, C. J., and BANERJI, J.:—The facts connected with this and the connected application are shortly as follows:—A suit was brought by the plaintiff for dower and also to set aside certain deeds executed by her deceased husband. A question as to the sufficiency of court fees arose, and eventually the court made a decree in the plaintiff's favour conditional upon her paying an extra court fee of Rs. 20, within a week. If this extra court fee was not paid the suit was to stand dismissed. What we have just now stated was all embodied in and was part of the decree itself. Unfortunately (it is said through the negligence of the plaintiff's pleader) she did not get proper information, with the result that she deposited Rs. 10 only within the time allowed. The defendants then made an application for execution of the decree on the ground that the decree was now in their favour, the deposit of Rs. 20 not having been made as provided in the decree. The plaintiff sought in vain to be allowed to pay in the extra Rs. 10. The court doubted that it had jurisdiction to extend time and rejected the

(1) (1917) 15 A. L. J., 511.

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application for extension of time. The plaintiff comes here in revision and contends that the court had jurisdiction and it ought to have exercised it. This Court always feels great difficulty in interfering with the discretion of the courts below on matters of discretion. But there seems to be a more formidable objection to the present application, namely, that once the term about depositing the Rs. 20 was embodied in the decree, the court itself, even if it desired, had no jurisdiction to alter its own decree save on an application for review of judgment under section 114, read with order XLVII, rule 1. The case of *Naik Ram v. Bhagwan Chand* (1) is cited. This was a decision of a single Judge and the judgment consists of a single line. The circumstances were no doubt in principle the same as in the present case. The judgment of the Court is :—"The court had undoubtedly jurisdiction to extend the time." It has been over and over again held in pre-emption suits, where the decree itself provides that the pre-emptor is to have possession conditional upon his paying the pre-emption money into court within a specified time, and that upon his failure to do so the suit shall stand dismissed, that the court has no jurisdiction to extend the time. The ground for these decisions has always been that the court has no jurisdiction to interfere with its own decree save in the manner we have mentioned above. There is no distinction between a pre-emption decree and any other decree which embodies certain conditions and provides for the suit being dismissed if those conditions are not complied with. The only exception is that of mortgage decrees : time can be extended in mortgage decrees by virtue of the provisions of order XXXIV. We reject the application, but under the circumstances we make no order as to costs.

We may here mention that we think that it would have been better had the court, after determining that the extra fee was payable, ordered the fee to be paid within a certain time, and delayed passing its decree until that time had expired.

Application rejected.

(1) (1917) 15 A. L. J., 511.

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APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Chandra Banerji.

MOHNI (PLAINTIFF) v BAIJ NATH AND OTHERS (DEFENDANTS)*
Act No. III of 1907 (Provincial Insolvency Act), section 22—Insolvency—Execution of decree—Attachment—Objection of claimant to attached property disallowed—Judgment-debtors declared insolvent—Suit by claimant for declaration of title.

Certain property was attached in execution of a decree. M, claiming that the property attached belonged to her and not to the judgment-debtors, filed an objection to the attachment. Her objection was disallowed. She then filed a suit for a declaration of her title, and, as the judgment-debtors had meanwhile been adjudicated insolvents, joined as a defendant the receiver of their property. *Held*, that the suit was maintainable and was not barred by section 22 of the Provincial Insolvency Act, 1907. *Mul Chand v. Mwan Lal* (1) distinguished. *Jhunku Lal v. Panna Lal* (2) referred to.

THE facts of this case were as follows :—

A certain house was attached by one Baij Nath in execution of a decree against Salig Ram and Sagar Mal. Salig Ram and Sagar Mal were adjudged insolvents and their property vested in a receiver. One Musammat Mohni, claiming the house as her own, filed an objection to the attachment. Her objection having been disallowed, she instituted the present suit, and implored, amongst other defendants, the receiver in insolvency. The court of first instance dismissed the suit, holding it to be barred by the provisions of section 22 of the Provincial Insolvency Act, 1907, and this decree was upheld on appeal. The plaintiff thereupon appealed to the High Court.

The Hon'ble Munshi Narayan Prasad Ashthana, for the appellant.

Mr. B. E. O'Connor (with him Babu Panna Lal Banerji and Munshi Panna Lal), for the respondent.

RICHARDS, C. J., and BANERJI J. :—This appeal arises out of a suit for a declaration of right. The plaintiff claimed a certain house as being her property. The house had been attached by one Baij Nath in execution of a decree against Salig Ram and

* Second Appeal No. 1135 of 1916, from a decree of Durga Dat Joshi, First Additional Judge of Aligarh, dated the 1st of April, 1916, confirming a decree of Sudershan Dayal, Second Additional Subordinate Judge of Aligarh, dated the 25th of December, 1915.

(1) (1913) I. L. R. 36 All. 8. (2) (1916) I. L. R., 39 All., 204.

Sagar Mal. Salig Ram and Sagar Mal were declared insolvents and any property they had vested in the receiver. The Musamat, as already stated, claimed the property as being hers and said that it did not belong to Salig Ram or to Sagar Mal. Her objection having been disallowed, she was clearly entitled to bring a suit for a declaration of her title and a necessary party to that suit would be the receiver in insolvency who represented the claims (if any) of Salig Ram and Sagar Mal and their creditors. Both the courts below have dismissed the suit as being barred by the provisions of section 22 of the Provincial Insolvency Act. That section is as follows :—“ If the insolvent, or any of the creditors or any other person is aggrieved by any act or decision of the receiver, he may apply to the court, and the court may confirm, reverse or modify the act or decision complained of and make such order as it thinks just”. The plaintiff in the present case was not complaining of any act or decision of the receiver in the insolvency. She was complaining that the court which was executing the decree of Baij Nath had disallowed her objection and decided that the property was the property of the insolvents. It seems to us that section 22 does not apply under the circumstances of the present case [see *Jhunku Lal v. Piari Lal* (1)]. The lower appellate court has relied upon the case of *Mul Chand v. Murari Lal* (2). The facts there were quite different. The property had not been attached in execution of a decree, but had been taken possession of by the receiver as being property belonging to the bankrupt.

We allow the appeal, set aside the decree of the lower appellate court and remand the case to that court, with directions to re-admit the appeal and deal with it according to law. Costs here and heretofore will be costs in the cause.

Appeal decreed and cause remanded.

(1) (1916) I. L. R., 39 All., 204.

(2) (1913) I. L. R., 30 All., 8.

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April, 30.

Before Justice Sir Pramada Chaman Banerji and Mr Justice Abul Raoof
GOBARDHAN (DEFENDANT) v MUNNA LAL (PLAINTIFF*).
Civil Procedure Code (1908), section 11, explanation V—Mortgage—Suit for sale—Person claiming paramount title impleaded—Decree in favour of mortgagee plaintiff—Suit by paramount owner for declaration of title—Res judicata

In a suit brought by a mortgagee to enforce his mortgage, a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary party, and the question of the paramount title cannot be litigated in such a suit. *Joti Prasad v. Aziz Khan* (1) and *Jaggaswar Dutt v. Bhuban, Mohan Mita* (2) referred to.

Two suits for sale on separate mortgages of the same property were filed, and in each the mortgagees impleaded a third party as a subsequent mortgagee of a portion of the property in suit. The party so impleaded was in reality the owner of a considerable portion of the property comprised in the mortgages sued upon, though he was not impleaded in that capacity. In the first suit the puisne mortgagee did not appear. In the second he attempted to set up his paramount title, but was not allowed to do so. The mortgagors likewise attempted to set up the paramount title of the person impleaded as puisne mortgagee, and in their case also the defence was ruled out. In the result, decrees were passed in favour of the plaintiff. The puisne mortgagee then brought a suit for a declaration of his title to part of the mortgaged property. *Held*, that the suit was not barred by anything which had happened in the course of the previous litigation. *Gurija Kanta Chakrabarty v. Mohan Chandra Acharyya* (3) referred to.

THE facts of this case were as follows :—

Misri Lal and Murli held two mortgages, dated the 20th of October, 1906 and the 8th of April, 1908, respectively, in both of which the same $4\frac{3}{4}$ biswas of a certain village were mortgaged. Subsequently the mortgagors mortgaged 1 biswa out of the $4\frac{3}{4}$ biswas to Munna Lal. Misri Lal and Murli brought two suits on their two mortgages, and in each suit they impleaded Munna Lal as a subsequent mortgagee. In the first suit, based on the earlier mortgage, Munna Lal did not appear, but the mortgagors raised a plea that they were the owners of only 1 biswa out of the $4\frac{3}{4}$ biswas which they had mortgaged and that Munna Lal was the owner of the remaining $3\frac{3}{4}$ biswas.

* Second Appeal No. 1600 of 1916, from a decree of D. R. Lyle, District Judge of Agra, dated the 30th of August, 1916, confirming a decree of Pirbhvi Subordinate Judge of Muttra, dated the 18th of June, 1915.

(1) (1908) I. L. R., 31 All., 11.

(2) (1908) I. L. R., 33 Cal., 425.

(3) (1915) 35 Indian Cases, 294.

An issue was framed on the point, but the court decided that the mortgagors were estopped from impugning the validity of their mortgage, and decreed on the 25th of January, 1913, the sale of the whole property. In the second suit Munna Lal appeared and set up his title to the $3\frac{1}{2}$ biswas. The court held that the question of Munna Lal's paramount title could not be decided in that suit and decreed the suit in respect of the whole property on the 26th of March, 1914, and said that Munna Lal might bring a separate suit to try the question of his title. Munna Lal then brought a suit for that purpose and claimed a declaration that the $3\frac{1}{2}$ biswas belonged to him and were not liable to be sold in execution of the decrees obtained by Misri Lal and Murli. The defendants raised, *inter alia*, the plea that the two decrees aforesaid operated as *res judicata* and that Munna Lal could not now raise the question of his title. Both the lower courts overruled this objection, and finding on the merits in favour of Munna Lal, decreed his suit. Hence this appeal.

Mr. A. H. C. Hamilton (with him Babu Sheo Dihal Sinha), for the appellants :—

The question as to whether the mortgagors owned the whole of the $4\frac{1}{2}$ biswas or whether Munna Lal owned $3\frac{1}{2}$ biswas out of it is *res judicata* between the parties. Munna Lal was a party to the suits brought on the two mortgages. In the second of those two suits the court did not decide the question of Munna Lal's ownership and expressly left the matter open for a future suit. But in the first suit an issue was framed as to the extent of the mortgagor's share in the property mortgaged, and that issue was decided against Munna Lal. It was immaterial that he was absent and did not defend the suit. The decree in the first suit operates as *res judicata*. I am supported by the ruling in *Shyama Charan Banerji v. Mrinmayi Debi* (1). Although in the second suit the question was not gone into and determined, yet it having been determined between the same parties in the first suit, the decree in the first suit constitutes a *res judicata*.

The Hon'ble Munshi Narayan Prasad Ashthana, for the respondent :—

In the previous suits Munna Lal had been impleaded only as a subsequent mortgagee, and in the capacity he could raise only

(1) (1905) I. L. R., 31 Cal., 79.

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those pleas which the mortgagors themselves could raise. He, therefore, could not raise any plea which would detract from the validity of the mortgages. No doubt he also filled another character by virtue of his paramount title in respect of $3\frac{1}{2}$ biswas. But this title he could not put in issue in that suit, nor could the court adjudicate upon it. In the first suit the court held that the mortgagors were estopped from disputing the extent of the share, and any pronouncement on the question of Munna Lal's ownership was in the nature of *obiter dictum*, and not conclusive. The question of his title was not a matter directly and substantially in issue in the mortgage suit, and the decree does not operate as *res judicata*. I rely on the following cases:—*Joti Prasad v. Aziz Khan* (1), *Jaggewar Dutt v. Bhuban Mohan Mitra* (2), and *Grija Kanta Chakrabutty v. Mohim Chandra Acharjya* (3).

Mr. A. H. C. Hamilton, in reply:—

There is a passage at p. 439 of the case in I. L. R., 33 Calc., cited by the respondent, which shows that where in a mortgage suit a question of paramount title is gone into and determined, it is an effective decision on the point. There is no reason why such a decision should not have the force of *res judicata*.

BANERJI and ABDUL RAOOF, JJ.:—This appeal arises out of a suit brought under the following circumstances. Sohan Lal and Shiam Lal, defendants, executed two mortgages in favour of Misri Lal and Murli on the 20th of October, 1906 and the 8th of April, 1908, respectively. In both mortgages the same property, namely, $4\frac{1}{2}$ biswas of mauza Behta, mahal Munna Lal, was mortgaged. Subsequently to these mortgages, the mortgagors mortgaged a one biswa share out of the aforesaid $4\frac{1}{2}$ biswas in favour of Munna Lal. The mortgagees brought two separate suits on the basis of the two mortgages, and impleaded as defendants to each suit not only the mortgagors but Munna Lal also. Munna Lal was made a party to each of these suits as subsequent mortgagee of a one biswa share. The first suit was decreed on the 25th of January, 1913, and the second on the 26th of March, 1914. In the first suit Munna Lal did not appear, but the mortgagors raised the plea that they were the owners of a one biswa share. (1) (1905) 1 L. R., 81 All., 11. (2) (1905) I. L. R., 33 Calc., 425. (3) (1915) 35 Indian Cases 1294

share only and were not competent to mortgage the remaining $3\frac{1}{2}$ biswas, which, they alleged, belonged to Munna Lal. The court framed an issue as to the extent of the mortgagors' rights and the validity of the mortgage as regards $3\frac{1}{2}$ biswas, and decided that the mortgagors were estopped from asserting that the whole of the property which they professed to mortgage did not belong to them. In the course of the judgment the court made some remarks as to Munna Lal's rights, and in the end made a decree for the sale of the whole of the mortgaged property, namely, the $4\frac{1}{2}$ biswa share in mauza Behta. In the second suit brought upon the second mortgage Munna Lal did appear and he put forward the contention that the $3\frac{1}{2}$ biswas belonged to him and that the mortgagors had no right to mortgage that share. The court held that as Munna Lal set up a paramount title as regards the $3\frac{1}{2}$ biswa share, the question of his title could not be tried in the suit, and refused to try it, but it made a decree for the sale of the $4\frac{1}{2}$ biswas. In that suit the court distinctly said that Munna Lal's remedy was to bring a suit of his own to try the question of his title. The present suit was thereupon instituted by Munna Lal and he asked for a declaration that the mortgagors were the owners of only a one biswa share and that the mortgagees had no right to put to auction sale, in execution of the two decrees obtained by them, any portion of the remaining $3\frac{1}{2}$ biswa share, which, he alleged, belonged exclusively to him and not to the mortgagors. Both the court of first instance and the lower appellate court found that the $3\frac{1}{2}$ biswas claimed by the plaintiff belonged to the plaintiff and that the mortgagors Sohan Lal and Shiam Lal were owners of one biswa only. It was contended in the courts below, that the previous decrees obtained by the mortgagees operated as *res judicata* and the question of the plaintiff's alleged title could not be re-opened and litigated in a separate suit brought by the plaintiff. This plea was overruled by the courts below. It has been repeated in the appeal before us. Mr. *Hamilton*, who appears for the appellants, has conceded that as in the second suit brought on the basis of the second mortgage decided by the Subordinate Judge on the 26th of March, 1914, the court distinctly refused to try the issue as to the title of Munna Lal in respect of $3\frac{1}{2}$ biswas, the decision in that case cannot be held to be *res*

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judicata ; but he contends that the decision in the earlier suit has the effect of *res judicata*. As we have said above, both the courts below have found that the property claimed by the plaintiff Munna Lal belongs to him. We have, therefore, to consider whether Munna Lal is precluded by any provisions of law from putting forward the title which has been found to exist in him and in respect of which we are bound to accept the finding of the court below. In order to determine whether the question of Munna Lal's title is *res judicata*, we have to see whether in the previous suit this question was directly and substantially in issue. We must take it as settled law that in a suit brought by a mortgagee to enforce his mortgage a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary party, and the question of the paramount title cannot be litigated in such a suit. We may refer to the decision of this Court in *Joti Prasad v. Aziz Khan* (1). That case followed a ruling of the Calcutta High Court in *Jaggeswar Dutt v. Bhuban Mohan Mittra* (2). It is true that in the present instance Munna Lal was made a party to the suit brought by the mortgagees on the basis of the first mortgage, but he was made a party, not as a person claiming a paramount title, but as subsequent mortgagee of a one biswa share and thus representing the mortgagors as regards that share. As such representative he could not raise the question of his paramount title. That apparently was the reason why he did not appear in the suit. He filled two capacities in that litigation ; viz, first, that of a subsequent mortgagee and as such representing the mortgagors as regards a part of the mortgaged property ; and secondly, as a person setting up a paramount title in respect of $3\frac{1}{2}$ biswas. The question of his paramount title could not be litigated in that suit. Therefore no issue could be framed in regard to that question and no such issue could be determined as an issue which arose directly and substantially, as between him and the mortgagee. The mortgagors it is true, asserted that Munna Lal owned a $3\frac{1}{2}$ biswas share and that they, the mortgagors, were not competent to mortgage that share and to the extent of that share the mortgage was invalid. It is in reference to this plea that an issue was framed as to the right

(1) (1908) I. L. R. 31 All. 11. (2) 1908 I. L. R. 31 Cal. 222.

of the mortgagors to mortgage the whole of the $4\frac{1}{2}$ biswas. The court decided that the mortgagors who had made the mortgage were estopped from questioning the validity of the mortgage and asserting that they were not the owners of the property which they mortgaged on the representation that they were the owners thereof. In the course of the judgment the learned Subordinate Judge made some observations in respect to Munna Lal, but these observations were nothing more than *obiter dicta* and could not, as between the mortgagees and Munna Lal, be treated as a decision on the question of the paramount title of Munna Lal. In this view it cannot be said that the question of Munna Lal's title has become *res judicata* by reason of the decision in the previous suit. It may be, as observed in *Jaggewar Dutt v. Bhuvan Mohan Mitra* (1), that if Munna Lal had allowed the question of his paramount title to be determined in the suit, he might not be permitted in appeal to contend that the decree of the court below was vitiated by reason of the determination of that question, but that was not the case here. In the present suit Munna Lal did not appear, and he did not put into issue the question of his title in respect of the $3\frac{1}{2}$ biswas share. That question, therefore, remained an open question as between him and the mortgagee and he is entitled in a subsequent suit to raise the same question. It is true that the decree in the previous suit was a decree for the sale of the whole of the $4\frac{1}{2}$ biswas, but that is the only decree which could be made in the previous suit, and, so far as the $3\frac{1}{2}$ biswas share is concerned, Munna Lal must be treated as if he was not a party to the previous suit. The principle of the decision of the Calcutta High Court in *Girija Kanta Chakrabutty v. Mohim Chandra Acharjya* (2) is applicable to the present case. There in a suit by a mortgagee the legal representative of one of the mortgagors who had died was made a party as representing the mortgagor. A decree was obtained against him and the property was sold. The auction purchaser having been resisted in obtaining possession of a portion of the property sold brought a suit for possession. In that suit the representative of the mortgagor, who had been a party to the previous suit, set up an independent title to the property claimed.

(1) (1906) I. L. R., 33 Calo., 425. (2) (1915) 35 Indian Cases, 294.

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It was held that he was not precluded from raising the question of his title by reason of the previous decree passed against him. In this case Munna Lal was a party to the suit as representing the mortgagor in respect of a one biswa share. He could not be made a party as claiming paramount title to the remaining 3½ biswas. The fact of a decree having been passed against him as representative of the mortgagors could not, upon the principle of the ruling to which we have referred and on general principles, preclude him from bringing a suit of his own to try the question of his title, and the court from granting a decree to him in respect of the title which it has found to exist. In this view we are of opinion that the appeal must fail. We accordingly dismiss it with costs.

Appeal dismissed.

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Before Justice Sri Pramada Chanan Banerji and Mr Justice Abdul Raoof.
HINGU SINGH AND OTHERS (DEFENDANTS) v. JHURI SINGH AND OTHERS
(PLAINTIFFS) AND RAMBAZ SINGH AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), order IX, rules 3 and 6—One plaintiff out of six present—Appearing plaintiff general attorney for the others—Dismissal of suit for want of prosecution—Dismissal on merits—Second suit on same cause of action barred.

On the date fixed for the hearing of a suit neither the defendants nor their pleader appeared. The plaintiffs' pleader also did not appear, but one of the plaintiffs was present. He was also the general attorney of the other plaintiffs. The court dismissed the suit for "want of prosecution." The plaintiffs applied to have the dismissal set aside, but their application was refused on the ground that their remedy was by means of a separate suit. They consequently brought a second suit claiming the same reliefs as they had claimed in the former suit. *Held* that, inasmuch as all the plaintiffs must be deemed to have been present through the plaintiff who had appeared and was general attorney for the non-appearing plaintiffs, the suit must be regarded as having been dismissed on the merits, and not under order IX, rule 3, of the Code of Civil Procedure, and a second suit on the same cause of action was therefore barred.

The facts of this case are fully stated in the judgment of the Court.

Dr S. M. Sulaiman, for the appellants.

Mr. M. L. Agarwala, for the respondents

BANERJI and ABDUL RAOOF, JJ. :—This is a somewhat unfortunate case. The facts which have given rise to it are as follows.

* First Appeal No. 113 of 1917, from an order of Shekhar Nath Banerji, Subordinate Judge of Jaunpur, dated the 11th of June, 1917.

The plaintiffs, who are six in number, brought a suit for the same relief which they have claimed in the present suit. That case was taken up for hearing, and one of the plaintiffs was examined. The parties then informed the court that they would abide by the deposition of a particular person. A date was fixed and on that date the person named appeared, but refused to make any statement. Thereupon the case was postponed and the 15th of September, 1914 was fixed for hearing and the parties were ordered to produce their evidence on that date. On the 15th of September, 1914, when the case was called on for hearing, the defendants or their pleader did not appear. The plaintiffs' pleader also did not appear. One of the plaintiffs, Jhuri Singh, was present, but he did not "prosecute the suit" by which we understand the trial court to mean that he adduced no evidence. Thereupon the court made an order dismissing the suit "for want of prosecution" (*ba-adam-pairawi*). The plaintiffs applied to have this dismissal set aside, but their application was refused on the ground that their remedy was a separate suit. They thereupon instituted the present suit for the same reliefs. The court of first instance dismissed it on the ground that the suit was not maintainable in view of the dismissal of the former suit. It held that the dismissal must be deemed to be a dismissal on the merits under order XVII, rule 3, of the Code of Civil Procedure and therefore a subsequent suit could not be maintained. This decision of the court of first instance was reversed by the lower appellate court, which was of opinion that order XVII, rule 2, of the Code of Civil Procedure was applicable to the case and that the suit was maintainable. That court accordingly remanded the case to the court of first instance. From this order of remand the present appeal has been filed. The question we have to consider is whether, under the circumstances mentioned above, a second suit is maintainable. It is clear that on the date which was fixed for the hearing of the former suit, namely, on the 15th of September, 1914, what the court had to do, when it took up the case, was to ascertain whether the parties were present and which of them. After this the court had to take action under the provisions of order IX. If neither party was present it had to dismiss the suit under rule 3 of that order.

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In that case the remedy of the plaintiffs would be either to apply to have the suit restored or to bring a fresh suit on the same cause of action, if not barred by limitation. If the plaintiffs were present and the defendants were absent, the court had to proceed under rule 6 and hear the case *ex parte*. If the plaintiffs were absent and the defendants were present, it had to proceed under rule 8 and decide the case accordingly. In the present case one of the plaintiffs, Jhuri Singh, was, as stated above, present, and this is also stated in the judgment of the court which heard the first suit. It has been found in this suit, and the finding was never impugned, that he was the general attorney of all the other plaintiffs. Therefore we must take it that all the plaintiffs were present before the court, through Jhuri Singh, who appeared for himself and represented the other plaintiffs as their general attorney. As the plaintiffs were present the court could not take action under rule 3, and the only rule under which it could proceed was rule 6. In proceeding under rule 6 it had to consider whether the plaintiffs' case was proved and it could either decree the claim or dismiss it. In the present case the court dismissed the claim. We must hold that the case was dismissed under order IX, rule 6, because the plaintiffs did not satisfy the court by the evidence on the record or any evidence which they might have produced that their case was a true one. The court, it is true, did not say that it dismissed the suit because no evidence was adduced which satisfied the court that the claim was a true one, but the court said that there was an absence of prosecution. These words can only be understood as meaning that the plaintiffs did nothing to support their claim, that is to say, that there was no evidence which established the claim. The court's action could only be under order XVII, rule 3, that is to say, the court decided the case upon the materials before it. We are unable to hold that under these circumstances the suit must be deemed to have been dismissed under order XVII, rule 2, read with order IX, rule 3. It was not a case in which the plaintiffs were absent, nor was it a case in which the plaintiffs' pleader was present but had no instructions. If rule 3 of order IX had applied, the plaintiffs certainly would have been entitled to bring a fresh suit. As

that rule, under the circumstances of the present case, could not apply, the dismissal can only be regarded as one on the merits, and thus bars the institution of a fresh suit. It is true that when an application was made to the court to restore the suit to its original number, the court seemed to think that the dismissal was one under order IX, rule 3, but, as has already been pointed out, that dismissal, as a matter of fact, was not and could not be one under order IX, rule 3, and therefore no application could be made under rule 4 of that order. We think that the view taken by the court of first instance was right. We accordingly allow the appeal, set aside the order of the court below and restore the decree of the court of first instance with costs.

Appeal allowed.

PRIVY COUNCIL.

RISAL SINGH AND ANOTHER (PLAINTIFFS) v. BALWANT SINGH
AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Allahabad.]

Hindu Law—Adoption by widow of son to deceased husband—Subsequent suit by her to set aside adoption on ground that she had no authority—Estoppel, dismissal of suit on ground of—Decision by Privy Council that she had authority and that adoption was valid—Decree properly made against widow representing estate, binding effect of on reversioner—Res judicata—Civil Procedure Code, 1908, section 11.

After adopting a son to her deceased husband a Hindu widow in a suit by an alleged reversioner against her to set aside the adoption on the ground that she had no authority from her husband to make the adoption alleged in her written statement and stated in court through her pleader that she had authority to make the adoption, and that it was valid. The suit was dismissed because the plaintiff was found not to be a reversioner. The widow then brought a suit against the adopted son to set the adoption aside, pleading that she was not vested with authority from her husband to adopt and denied having made the adoption. The adopted son contested the suit, and it was decided by the courts in India on the ground that the widow was estopped from maintaining it. On appeal, however, the Privy Council raised an issue as to her authority to adopt, and held on the evidence on that issue that the adoption was valid. In a suit by an alleged reversioner to the estate of her husband against the adopted son for a declaration that the adoption was invalid and for possession of the estate.

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* Present :—Lord SUMNER, Sir JOHN EDGE, Mr. AMER ALI, and Sir WALTER PHILLIMORE, BART.

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Held that notwithstanding the personal estoppel which bound her, the widow represented the estate on the question of fact as to whether the defendant (respondent) had or had not been validly adopted, and that she represented it within the meaning of the rule laid down in *Katama Nutehra, v. The Rajah of Shivagunga* (1), and under the circumstances the decree against her would bind the reversioners.

Though the rule of *res judicata* as enacted in section 11 of the Code of Civil Procedure, 1903, was not strictly applicable, as the appellants (plaintiffs) were not parties to the widow's suit against the adopted son, and did not claim through a party to that suit, yet the principle of *res judicata* had been rightly applied by courts in India so as to bind reversioners by decisions in litigation fairly and honestly given for or against Hindu females representing estates. In the absence of all authority their Lordships could not decide that a Hindu lady, otherwise qualified to represent an estate in litigation, ceases to be so qualified merely owing to personal disability or disadvantage as a litigant, although the merits of the case were tried, and the trial was fair and honest.

APPEAL 66 of 1917, from a decree (29th April, 1915) of the High Court at Allahabad, which affirmed a decree (4th March, 1915) of the court of Subordinate Judge of Saharanpur.

The only question for determination on this appeal was as to whether the appellants' suit was barred as being *res judicata*.

For the purpose of this report the facts are sufficiently stated in the report of the hearing of the case before the High Court (Sir H. R. RICHARDS, C J., and Sir P. C. BANERJI, and E. M. DES C. CHAMIER, JJ.). The CHIEF JUSTICE and Mr. Justice BANERJI differed, the former holding that the suit was not barred, and the latter deciding that it was (2).

The case was referred to Mr. Justice CHAMIER before whom it was argued and he agreed with Mr. Justice BANERJI that the decision of the Board in *Dharam Kunwar v. Balwant Singh* (2) created a bar to the maintenance of the suit.

On this appeal—

A. M. Dunne, K.C., and *Whitmore L. Richards*, for the appellants, contended that the suit was not barred as *res judicata* by the decision of the Board in *Dharam Kunwar v. Balwant Singh* (3) the appeal to the Privy Council in the suit by the Rani. In that suit her conduct estopped the Rani from denying that she had authority to adopt Balwant Singh. She could therefore not be said to represent the estate with regard to that issue within

(1) (1933) 9 Moo., I. A., 589 (604) (2) (1915) I. L. R., 37 All., 496.

(3) (1912) I. L. R., 34 All., 398; I. R., 39 I. A., 142.

the rules laid down in *Katama Natchiar v. The Rajah of Shivagunga* (1). That rule had not been applied to a case where the female holder was so estopped by facts personal to herself: there must be a "fair trial of the right" and that was absent here. Both courts below decided the case entirely on the ground of her estoppel, and the first court rejected evidence of her authority to adopt. The inference to be drawn upon the rejection of such evidence is that the Board had no intention to bind the reversioners by a judicial decision. The Civil Procedure Code, 1908, section 11, was not applicable, the appellants not having been parties to the previous suit; and the only question is whether they are bound under the rule laid down in the *Shivagunga* case (1). Reference was made to the English decisions as being in favour of view that there was no bar of *res judicata* to the suit: *Concha v Concha* (2); *Langmead v. Maple* (3) and *Robinson v. Duleep Singh* (4)

De Gruyther, K.C., and *J. M. Parikh*, for the respondents, contended that the Ram in the former suit represented the estate. The Privy Council intended to decide and did decide on the evidence that she had authority to adopt Balwant Singh and that decision was binding on the appellants on the rule laid down in *Katama Natchiar v. The Rajah of Shivagunga* (1). That rule was followed and applied in *Jugul Kishore v. Jotendro Mohun Tagore* (5); *Pertabnarain Singh v. Trilokinath Singh* (6); and *Hari Nath Chatterjee v. Mothurmohun Goswami* (7). There was no absence of the "fair trial of the right" in the rule so laid down; and there was nothing in the record to show that any evidence tendered had been excluded. The question of whether all the necessary evidence was before the Board was for the Board itself to determine. The effect of the decision was that the reversioners are to be regarded as being parties to the suit, though not claiming through the widow. Reference was made to *Chiruvolu Punnamma v. Chiruvolu Perrazu* (8); and *Venkata-narayana Pillay v. Subbammal* (9). Section 11 of the Code

(1) (1863) 9 Moo, I A., 539 (604) (5) (1884) I. L. R., 10 Cal., 985; L. R. 11 I. A., 86.

(2) (1886) 11 App. Cas., 541 (549). (6) (1884) I. L. R., 11 Cal., 186; L. R., 11 I. A., 197.

(3) (1865) 18 O.B.N.S., 256 (270, 271). (7) (1893) I. L. R., 21 Cal., 8; L. R., 20 I. A., 183.

(4) (1879) 11 Oh. D., 798. (8) (1906) I. L. R., 29 Mad., 890.

(9) (1915) I. L. R., 39 Mad., 107; L. R., 42 I. A., 125.

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of Procedure, 1908, was therefore applicable, and under that section the sole question was whether the same issue was finally decided in the former suit: *Tirbhuvan Bahadur Singh v. Rameshar Bakhsh Singh* (1) In the former suit there was an issue settled as to the Rani's authority, the first respondent, and it was finally decided by the Privy Council that she had. It was not necessary that it should be decided by the Lower Courts in India. Reference was made to *Jagatjit Singh v. Sarabjit Singh* (2); *Abdullah Ashgar Ali Khan v. Ganesh Dass* (3); and as to successive adoptions to *Suryanarayana v. Venkataramana* (4).

The suit, it was submitted, was barred as being *res judicata*.

A. M. Dunne, K. C., in reply contended that section 11 of the Code of Civil Procedure, 1908, was not applicable. The rule in *Katama Natchiar v. The Rajah of Shivagunga* (5) as to reversioners being bound rested solely on the consideration that the widow represented the estate. But here, owing to her personal estoppel, she could not represent it. In her plaint she pleaded that the adoption should be declared not binding upon her. That evidence was excluded was shown by the record in the former suit, for it was made a ground of appeal, and also a ground for granting leave to appeal to the Privy Council.

1918, *June 3rd*:—The judgment of their Lordships was delivered by Sir JOHN EDGE:—

This is an appeal from a decree, dated the 29th of April, 1915, of the High Court at Allahabad, which affirmed a decree of the Additional Subordinate Judge of Saharanpur by which the suit of the plaintiffs had been dismissed. The suit was dismissed on the ground that a decision of the Board on the 23rd of April, 1912, in an appeal to His Majesty in Council in a previous suit, in which Balwant Singh, the principal defendant in this suit, was the defendant, and the late Rani Dharam Kunwar was the plaintiff, operated as a bar to the maintenance of this suit, which is brought by plaintiffs who were not parties to the previous suit, and

(1) (1906) I. L. R., 28 All., 727 (740) : I. R., 33 I. A., 156 (164).

(2) (1891) I. L. R., 19 Calc., 159 (172) : I. R., 18 I. A., 165 (176).

(3) (1917) I. L. R., 45 Calc., 442 : I. R., 44 I. A., 218.

do not represent either party to the previous suit. That decision is reported in 39 I. A., 142., *Rani Dharam Kunwar v. Balwant Singh* (1).

In this suit the plaintiffs are Chaudhri Risal Singh and Lala Fateh Chand. The plaintiff, Chaulhri Risal Singh, claims in this suit possession of part of the Landhaura Raj, which is a large estate of great value; his claim is based on an allegation that he is the heir of Raja Jigat Prakash Singh, whom he alleges to have been the last male owner of the estate. The other plaintiff, Lala Fateh Chand, alleges that before suit Chaudhri Risal Singh conveyed to him the other part of the estate, and he claims possession of that other part of the estate as the grantee of Chaudhri Risal Singh. The plaintiffs also claim mesne profits.

The principal defendant to this suit is Balwant Singh, through whom the other defendants claim title. Balwant Singh's case is that the estate vested in him as the adopted son of the late Raja Raghubir Singh, to whom he alleges that he was validly adopted by the late Rani Dharam Kunwar, the widow of Raja Raghubir Singh, who admittedly died possessed of the estate. The factum of the adoption was denied by the plaintiffs, but it is no longer disputed, and cannot now be disputed (the plaintiffs, however, allege that Rani Dharam Kunwar had no authority to adopt a son to her husband, and further that if she ever had authority to adopt a son to her husband, that authority was a limited authority, and was exhausted by previous adoptions made by her before she went through the form of adopting Balwant Singh. The decision of the Board, which has been held by the Courts below to operate as a bar to the maintenance of this suit, related to the adoption of Balwant Singh as a son to her late husband by Rani Dharam Kunwar.

The plaintiffs allege, and the defendants deny, that on the death of Rani Dharam Kunwar on the 12th of November, 1912, the plaintiff, Chaudhri Risal Singh, was the next nearest reversioner, and was as such entitled to the estate of Landhaura. That issue as to the status of Chaudhri Risal Singh has not been tried, and is irrelevant if the suit is barred by the decision of the Board of the 23rd of April, 1912.

(1) (1912) I. L. R., 34 All., 398; L. R., 39 I. A., 142

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There has been much litigation relating to the title to the estate of which Raja Raghubir Singh died possessed, and in order to understand the case which was before the Board in 1912, it is necessary briefly to refer to that previous litigation and to the position of the several parties to it. Raja Raghubir Singh died on the 23rd of April, 1868, and at the time of his death he left no son living; his widow, Rani Dharam Kunwar, was then enceinte, and after his death she, on the 16th of December, 1868, gave birth to Raja Jagat Prakash Singh who was his posthumous child. Raja Jagat Prakash Singh died in childhood on the 31st of August, 1870, and on his death Rani Dharam Kunwar succeeded to the possession of the family property in right of her interest for life in it as his mother and heiress. The fact that she alleged that she obtained title to the property under oral will of her husband, Raghubir Singh, is immaterial. On the 4th March, 1877, Rani Dharam Kunwar adopted Tofa Singh as a son to Raja Raghubir Singh. Tofa Singh, then known as Raja Narendra Singh, died in childhood about two and a half years after his adoption. On the 20th of January, 1883, Rani Dharam Kunwar adopted another boy, named Ram Sarup, as a son to Raja Raghubir Singh. Ram Sarup, then known as Ram Padab Singh, died in June 1885. On the 13th of January, 1890 Rani Dharam Kunwar adopted Balwant Singh, the principal defendant in this suit, as a son to Raja Raghubir Singh. On the 13th of January, 1899, Chaudhri Ram Niwaz, who was the father of Balwant Singh, executed a deed, by which he acknowledged that he had given his son, Balwant Singh, then 16 years old, to Rani Dharam Kunwar, widow of Raja Raghubir Singh, deceased, Rais of Landhaura, as an adopted son for her and her husband, and stated that—

"the usual religious ceremonies and those connected with the *biradri* have been performed with all publicity to-day. From to-day the said son has no connection but with his natural family. From to-day the said son will have those rights in the whole of the property left by Raja Raghubir Singh, deceased, and possessed by the said Rani, which an adopted son legally acquires. But it has been agreed between me, the executant, and the said Rani, according to the provisions of the will and permission of Raja Raghubir Singh, deceased, that she shall, till the end of her life, continue to be the owner and possessor of the whole estate and property of every description belonging to the said Raja which exists at present or may be acquired in future; and as long as she lives all sorts of management and supervision of the estate shall rest with her as its owner."

On the 1st of May, 1900, one Baldeo Singh, claiming to be the reversionary heir of Raja Raghbir Singh, brought a suit in the Court of the Subordinate Judge of Saharanpur against Rani Dharam Kunwar and Balwant Singh to have the adoption of Balwant Singh set aside. In that suit evidence as to the alleged adoption was taken. The main contention of Baldeo Singh, so far as the adoption of Balwant Singh was concerned, was that Raja Raghbir Singh had not given to Rani Dharam Kunwar authority to adopt a son to him, and that any authority which Raja Raghbir Singh may have given to his wife to make an adoption was not an authority which enabled her to make successive adoptions. No oral evidence to prove that an authority to adopt had not been given to Rani Dharam Kunwar by Raja Raghbir Singh was apparently procurable; Rani Dharam Kunwar did not give evidence in that suit, but in her written statement in that suit she alleged that she had "under valid authority and after due proclamation adopted Balwant Singh, defendant no. 2, and the aforesaid adoption is in every way proper." Her pleader in that suit stated to the Court that the authority to adopt was oral, and as to the nature and scope of her authority to adopt, said that Raja Raghbir Singh's object in giving his wife authority to adopt was that "in the event of Rani Dharam Kunwar, who was then pregnant, giving birth to a daughter, or of a son being born and dying, she should adopt, and in the event of the death of that adopted son she should again adopt, and in the event of the last-named also dying, she had authority to adopt again, and so on." There was documentary evidence put before the Subordinate Judge and four witnesses were called to prove the oral authority to adopt, but the Subordinate Judge did not believe these witnesses, and he found that Rani Dharam Kunwar had not authority to adopt Balwant Singh, as the authority was not one authorizing her to make successive adoptions. Having found, however, that Baldeo Singh had failed to prove that he was a reversioner, the Subordinate Judge dismissed the suit, but in his decree he inserted his finding against the validity of the adoption. That decree came on appeal before the High Court at Allahabad, and the appeal was dismissed; but the High Court, on the application of Balwant Singh, struck out of

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the decree of the Subordinate Judge his finding as to the invalidity of the adoption on the ground that, Baldeo Singh having failed to prove that he was a reversioner, the issue as to authority to adopt did not arise and was irrelevant. That application was resisted by Rani Dharam Kunwar, and her advocate frankly informed the High Court that her object in wishing to have the invalidity of the adoption retained in the finding as to the decree of the Subordinate Judge was that it might be used as *res judicata* in future litigation between her and Balwant Singh.

Before Baldeo Singh's suit was dismissed Rani Dharam Kunwar and Balwant Singh had quarrelled. Balwant Singh was claiming his full rights as an adopted son and was refusing to be bound by the terms as to Rani Dharam Kunwar's position with regard to the ownership, management and control of the property that had come from Raja Raghubir Singh, which had been agreed to by Chaudhri Ram Niwaz in the deed of the 13th of January, 1899, and she determined to repudiate the adoption.

On the 7th of January, 1905, Rani Dharam Kunwar brought a suit against Balwant Singh in the Court of the Subordinate Judge of Saharanpur, and in her plaint alleged that Raja Raghubir Singh had never given her authority to adopt a son, and prayed that it might be declared that she had no power to adopt Balwant Singh, and had in fact never adopted him according to any ceremony under the Hindu law, and that a document of the 13th of January, 1899, in her name as the executant which purported to be a deed of adoption in favour of Balwant Singh was void and ineffectual as against her.

The deed of adoption of the 13th of January, 1899, which Rani Dharam Kunwar sought to have declared void was a registered deed in her name and under her seal in which she alleged that Raja Raghubir Singh, when he became hopeless of recovery in his last illness, made the following will in her favour, she being then pregnant:—

"If (God forbid!) you give birth to a daughter, or if a son be born but dies after his birth, I strictly order you to adopt some boy to me, so that he might perform my *shradh* ceremony and yours, and perpetuate my name, and after your death become the absolute owner and possessor of the whole of my estate. If (God forbid!) the son who might be adopted under this authority should die in your life time you will have power to adopt another boy."

In that deed Rani Dharam Kunwar, amongst several other things, also alleged that she on the day on which the deed bears date, after performing the necessary ceremonies adopted Balwant Singh, son of Chaudhri Ram Niwaz, to herself and her husband in the presence of the gentry, the district authorities, and other European gentlemen, and the members of her *biraṁri*, and that Chaudhri Ram Niwaz gave Balwant Singh to her as an adopted son. That deed was on the 19th of January, 1899, duly registered by the Sub-Registrar of Rurki, Rani Dharam Kunwar having first personally admitted in the presence of the Sub-Registrar its execution by her. In her plaint in her suit against Balwant Singh she endeavoured to explain away that deed by alleging that she had no knowledge of that deed before July 1904; that she had not got it registered; that it was written in her name without her knowledge on the 13th of January, 1899, by one Tahauwar Ali, who was her diwan in charge of her entire business, and was her adviser, and that he had got it registered. She also alleged in her plaint that having learnt during the pendency of Baldeo Singh's suit that Tahauwar Ali was secretly in collusion with Balwant Singh she dismissed him, and she also endeavoured to explain away her written statement in the suit of Baldeo Singh, admitting the adoption of Balwant Singh, and her pleader's statement in that suit as to her authority to make an adoption, by denying that her written statement and her pleader's statement had been authorized by her.

In the suit of Rani Dharam Kunwar against Balwant Singh he in his written statement, amongst other things, alleged that Rani Dharam Kunwar had authority to adopt him to Raja Raghubir Singh and that he had been validly adopted. The Subordinate Judge held that Rani Dharam Kunwar was by her acts estopped from denying that Balwant Singh had been validly adopted to Raja Raghubir Singh, and did not try any other issue. The High Court at Allahabad, agreeing with the Subordinate Judge, dismissed the appeal of Rani Dharam Kunwar, and thereupon she appealed to His Majesty in Council and again failed. The facts which this Board has stated as to the history of the litigation and as to the positions of the parties and their acts have been derived from the record of the appeal to His Majesty

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in Council in which the Board gave its decision of the 23rd of April, 1912. The evidence upon which that decision was arrived at was before the Board in the record of that appeal. It is said that evidence to show that Rani Dharam Kunwar had no authority to adopt Balwant Singh had been excluded in her suit, and that consequently the Board in 1912 ought not to have found that Balwant Singh had been validly adopted. It is true that Rani Dharam Kunwar applied to the Subordinate Judge that evidence should be taken, but it does not appear that she ever applied to have witnesses summoned or tendered any evidence which was rejected. It is difficult to conceive what oral evidence Rani Dharam Kunwar could have produced, except her own personal evidence, to prove that she had received from Raja Raghubir Singh no authority to adopt, and if she had given evidence that she had no authority to make the adoption such evidence, having regard to her own acts and documentary evidence on the record, could not have been accepted as true.

Their Lordships in this appeal pressed the learned counsel who appeared for the appellants to state what oral evidence there was available to prove or to suggest that Raja Raghubir Singh had not in this final illness given to Rani Dharam Kunwar his authority to adopt, but the learned counsel was not in a position to suggest what oral evidence could have been produced to prove that Raja Raghubir Singh had not given that authority to his wife. The Board in 1912 was satisfied, and rightly satisfied, that no further evidence as to the authority or absence of authority to adopt could be expected to be produced by anybody beyond the evidence then already taken. As appears from the report of the case in 9 Allahabad Law Journal Reports, 730, the learned counsel for Rani Dharam Kunwar contended in argument before the Board in 1912 that if it were held that Rani Dharam Kunwar was not stopped from denying that Balwant Singh had been validly adopted, the question arose whether she had any authority to adopt him; and further contended that such authority as she alleged would not extend to the adoption in question. There was ample material in the Appeal Record before the Board in 1912 upon which the Board might find that Raja Raghubir Singh had given authority to Rani Dharam Kunwar

to adopt a son to him, and that such authority was a general authority and was not limited to making one or more successive adoptions.

It is clear that the Board in 1912 did intend to decide the question of authority to adopt as a question of fact. In the judgment of the Board it is said :—

“The third question, viz., as to whether the Rani had authority from her husband to adopt the defendant gives rise to the point which has been argued before their Lordships ”

And then their Lordships dealt with the contentions on that subject, and found that Raja Raghbir Singh had given to Rani Dharam Kunwar a general power to adopt which justified her adoption of Balwant Singh, and said :—

“ Their Lordships, in reviewing the facts of the case, are of opinion that the question may well be decided as one of fact on the Rani's own statements without recourse to the doctrine of estoppel. In their view she was speaking the truth in Baldeo Singh's action when pleading as to her authority.”

It is clear that the reasons of the Board in 1912, for deciding thus as to the facts and for not confining the decision to the question of the estoppel were to quiet any religious scruples, which might have arisen if Raja Raghbir Singh could be said to have a son only by estoppel to perform religious duties, and also to put a stop to further litigation as to the validity of the adoption of Balwant Singh.

There can be no doubt, in their Lordship's opinion, that Rani Dharam Kunwar in her suit against Balwant Singh did, notwithstanding the personal estoppel under which she laboured, represent the estate on the question of fact as to whether Balwant Singh had or had not been validly adopted, and that she represented the estate within the meaning of the rules in *Katama Natchiar v. Srimut Rujah Moottro Vijaya Razandha Bodha Gooroo Sawmy Periya Odaya Tawar* (the *Shivagunga* case). (1). The principle of law to be applied in such cases was, their Lordships consider, correctly summarized by Mr. Justice BANERJI in his judgment in this case thus :—“Where the estate of a deceased Hindu has vested in a female heir a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir.”

(1) (1868) 9 Moo., I. A., 599.

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It cannot be said that there had not been a fair trial by the Board in 1912 of the right in the suit of Rani Dharam Kunwar against Balwant Singh. The right in that suit was his right to the estate as son validly adopted to Raja Raghubir Singh. It is true, as was pointed out in a judgment of the High Court in this suit, that the rule of *res judicata*, as enacted in section 11 of the Code of Civil Procedure, 1908, is not strictly applicable in this case, as the plaintiffs were not parties to the suit of Rani Dharam Kunwar against Balwant Singh, and do not claim under a party to that suit, but the principle of *res judicata* has been applied rightly by the Courts in India so as to bind reversioners by decision in litigation, fairly and honestly conducted, given for or against Hindu females who represent estates, as Rani Dharam Kunwar did in her suit against Balwant Singh.

It has been urged by the learned counsel for the appellants here that Rani Dharam Kunwar cannot be regarded as having represented the estate in her suit against Balwant Singh, as by her acts she was personally estopped from denying that she had validly adopted him to Raja Raghubir Singh. In the absence of all authority, their Lordships cannot decide that a Hindu lady, otherwise qualified to represent an estate in litigation, ceases to be so qualified merely owing to personal disability or disadvantage as a litigant, although the merits are tried and the trial is fair and honest. The principle is that reversioners must risk that, so that there may be an end to litigation.

Their Lordships will humbly advise His Majesty that this appeal fails, and should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants :—*T. L. Wilson & Co.*

Solicitor for the respondents :—*Edward Dalgado.*

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Justice Walsh.

RAM DULARI (DEFENDANT) v. HARDWARI LAL AND OTHERS (PLAINTIFFS).
Act No. IX of 1908 (Indian Limitation Act), schedule 1, article 115—Limitation—Sale—Covenant to make good loss in case of vendee being compelled to pay money in excess of sale consideration—Breach of covenant—Suit against vendors on covenant of indemnity.

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 April, 15.

Where vendees are suing their vendors on a covenant of indemnity contained in their sale deed, having been obliged to redeem a prior mortgage, the existence of which the vendors did not disclose, limitation runs, not from the date of the sale deed, but from the date when the plaintiffs suffered actual loss by reason of their being compelled to pay off the prior mortgage charge. *Hari Tewari v. Raghunath Tewari* (1) referred to.

THE facts of this case were as follows:—

The predecessor in interest of the appellant executed on the 23rd of April, 1889, a simple mortgage of certain property in favour of one Chatri Lal. Subsequently, on the 4th of July, 1901, he sold the same property to the plaintiffs. In the sale-deed there was no mention of the mortgage; on the other hand, there was a covenant to the effect that the property had been sold to the vendees free from all liabilities and debts, and that if any portion of the property passed out of the possession of the vendees or *if any excess amount were charged against them*, then the other properties of the vendor would be liable for the same, together with damages and costs. On an alternative reading of the words in vernacular the italicised words would be replaced by "if they were made liable for any prior encumbrance." On the 1st of August, 1902, Chatri Lal sued on his mortgage and obtained a decree for sale of the property. Eventually the 20th of May, 1915, was fixed for the sale, and on the 19th of May, 1915, the plaintiffs paid the amount of Chatri Lal's decree into Court and saved the property from sale. On the 10th of July, 1915, the plaintiffs brought a suit against the appellant for recovery of the amount together with interest from the estate of the vendor. Paragraph 4 of the plaint set out the covenant mentioned above; and the cause of action was said to have arisen

* First Appeal No. 57 of 1916, from a decree of Harihar Lal Bhargava, Subordinate Judge of Shahjahanpur, dated the 1st of December, 1915.

(1) (1888) I. L. R., 11 All. 27

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on the 19th of May, 1915. One of the pleas in defence was that of limitation. The court of first instance held that the cause of action for the suit did not accrue till the plaintiffs had to pay the money on the 19th of May, 1915, and that the suit was therefore within time. The court decreed the suit. Hence this appeal.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Babu *Sarat Chandra Chaudhri*) for the appellant :—

The suit is essentially one for damages for breach of the covenant of title contained in the sale-deed. That covenant was in the following terms, "the property has been sold to the vendees free from all liabilities and debts." The title was guaranteed to be free ; but it was not free owing to the existence of the mortgage of 1889. The stipulation amounted to this, that the vendor was undertaking that there were no encumbrances or that if there were any, they had been cleared by him or would be cleared by him before the transaction of sale was completed. At the time when the sale was completed there existed contrary to the stipulation conveying an absolutely free title, an outstanding encumbrance on the property sold. Consequently, the breach of the stipulation occurred as soon as the sale was effected ; and the cause of action for a suit for damages for breach of the covenant arose on the date of the sale. It is pointed out in *Halsbury's Laws of England*, Vol. 27, pp. 462 464 465, that such a covenant is not a continuing covenant but is broken once and for all at the time of the conveyance if there is a defect in title ; and consequently time begins to run forthwith. This principle has been followed in India in the case of *Tulsiram v. Murlidhar* (1), and was discussed with approval in the case of *Ardesir v. Vajesing* (2). The same rule is laid down in *Dart : Vendors and Purchasers*, 7th Edition, pp. 788, *et seq.* ; and a distinction is drawn there, as well as in the passage from *Halsbury's Laws of England* cited above, between a covenant of title and a covenant for quiet enjoyment, as to the point of time from which limitation for an action for breach begins to run in either case. In the case of *Hari Tiwari v. Raghunath Tiwari* (3) EDGE, C. J., remarked

(1) (1902) I. L. R., 26 Bom., 750 (754). (2) (1901) I. L. R., 25 Bom., 593 (603).

that if the suit had been for the breach of a covenant of title, no doubt the period of limitation would begin to run from the time when the deed was executed. As, however, there was no covenant of title in that case but only a covenant for quiet enjoyment, it was held that the cause of action did not arise until the happening of an event disturbing that enjoyment. Reference was made to *Turner v. Moon* (1) and *The Secretary of State v. Pemmaraju* (2). The cause of action having arisen on the date of the sale, the suit should have been brought within six years of that date, under article 116 of the Limitation Act. As has been laid down in many of the authorities already cited time begins to run, in such cases, from the date of the conveyance, although the vendee may not have knowledge of the defect in the title. It is, therefore, immaterial when the plaintiffs came to know of the existence of the mortgage. At any rate, they had knowledge of it when they were made parties to Chatri Lal's suit in 1902. Even if it be regarded that the cause of action arose on the date of the decree in that suit, the present suit is still barred by time.

Pandit *Baldev Ram Dave*, for the respondents, was not called upon.

PIGGOTT and WALSH, JJ. :—This is an appeal by the defendant in a suit which, as brought, was a suit for damages on account of the breach of a covenant of indemnity contained in a sale-deed of the 4th of July, 1901. That deed in itself arose out of and formed the completion of a transaction embodied in a previous deed of the 9th of January, 1899. The plaintiffs in this case represent the transferees of the vendees under these two deeds and the defendant the vendor in each of these deeds. The vendor purports to convey certain property free of all encumbrances, and in each of them there is a covenant setting forth what is to happen in the event of its being found that the property is in fact encumbered, and in the event of the vendees being disturbed in possession or having to make any payment on account of some previously existing encumbrance. The matter is clearer in the earlier of the two deeds, but no doubt the point has to be decided with reference to the agreement as embodied

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1) (1901) 2 Ch., 825. 2) (1916) 80 M. L. J., 575; 35 Indian Cases 254.

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at the end of the deed of the 4th of July, 1901 on page 8 R of the book before us. We have only referred to the previous document in order to explain the nature of the transaction as throwing light on the intention of the parties and the footing on which they were dealing with one another. Unfortunately, in the deed of the 4th of July, 1901, there has been a clerical error on the part of the scribe in that very portion of the document which is most material for our purpose. We are not sure that this error is really vital to the decision of the question argued before us, but the error is there and it is as well that attention should be called to it. A certain word in the deed may have been intended to be written as "maqabal" or as "fazil". As the document stands it is actually written "faqabal," which is nonsense, but it must be intended to be read as one or other of these two words. Now on the one reading the expression is correctly translated in our paper book by the words "or if any excess amount is charged against them," on the other reading, we may translate "or if they are held chargeable with any encumbrance." The latter of these two readings would be less favourable to the appellant's case and for the purposes of argument we may adopt the former. The covenant then is that, in the event of the vendees having to pay some excess amount, that is to say, some further charge over and above the sale consideration set forth in the deed, the estate of the vendor will be liable to make it good, together with damages and costs. Immediately before the words above set forth there is a recital that the property is conveyed to the vendees free from all debts and liabilities or claims. Then follows the agreement that if any portion of the property passes out of the possession of the vendees, or they fail to obtain possession, or finally, in the alternative, if any excess amount is charged against them, the other property of the vendor will be liable for damages. It subsequently transpired that there was a prior encumbrance on the property conveyed in the shape of a mortgage in favour of one Chattri Lal. A suit was brought on this mortgage in which the present plaintiffs, the vendees, were impleaded along with the original mortgagor. The claim was contested, but resulted finally in a decree in favour of Chattri Lal and in order to save

the property from sale under that decree the present plaintiffs, the vendees under the deed of the 4th of July, 1901, had to pay up the sum now claimed by them, consisting of the mortgage money due to Chatri Lal along with interest and costs. In the court below this claim was resisted upon a variety of pleas, some of which are repeated in the memorandum of appeal now before us, but the appeal has been argued upon one ground only, namely, on the plea of limitation.

There was an issue on this point in the court below (issue No. 5), and the learned Subordinate Judge disposed of it very briefly, by pointing out that in his opinion the cause of action accrued to the plaintiffs in the month of May 1915, when they had to pay the money to Chatri Lal, and that this plaint had been filed with great promptitude in the month of July 1915. He held therefore that it was clearly within time. Curiously enough, in the memorandum of appeal before us this finding on the question of limitation is not in express terms challenged. We have been told, however, that there has been some error or oversight about the drafting of the memorandum of appeal and that the plea taken in the first paragraph was intended to read, "that the plaintiffs had no subsisting cause of action," and so raised the question of limitation. At any rate we have heard the appellant on this point, and it was within our discretion to do so. The plea is based upon the contention that the agreement embodied in the last paragraph of the deed of the 4th of July, 1901, was simply a covenant of title, that there was a breach of this covenant the moment the deed itself was executed, that a cause of action accrued to the plaintiffs on that very date and that consequently the present suit is barred under the six years' rule of limitation. As subsidiary arguments on this point our attention has been drawn to the fact that the mortgage in favour of Chatri Lal was a registered document, of which it might be said that the plaintiffs had constructive notice, and that in any event they had actual notice of it when Chatri Lal instituted his suit, which was as long ago as the year 1902. The argument before us has proceeded upon lines which evidently were not followed in the court below. Our attention has been drawn to a number of rulings, of which the decision most in

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point is that in *Hari Tiwari v Raghunath Tiwari* (1) What that case seems to us to lay down is that, if the plaintiffs in a suit like the present were bound to rely solely upon a covenant of title, whether express or implied, it might be held that limitation ran against them from the date of the execution of the deed; but in that suit itself a distinction was drawn, and the plaintiffs were held to be within time, because they were not suing upon a mere covenant of title, and it was held that their cause of action arose long subsequently when they were dispossessed of a portion of land then in question.

Similarly, in the present case, it seems to us that the plaintiffs are entitled to rely upon the words already set forth as a covenant of indemnity and to bring a suit upon them from the date on which they suffered actual loss by reason of their being compelled to pay off the prior mortgage charge. The decision of the court below on the issue of limitation therefore appears to be substantially correct on the ground on which it proceeds, although the point was not fully argued. The appeal, therefore, fails and we dismiss it with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr Justice Piggott.

MUHAMMAD ALI KHAN v RAJA RAM SINGH. *

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 May, 4

Criminal Procedure Code, section 250—Compensation—Accused tried on two charges and acquitted on one, but convicted on the other.

Section 250 of the Code of Criminal Procedure is only applicable where the trying court discharges or acquits the accused altogether.

It cannot be made use of where the accused, being tried on two charges, is acquitted on one, but convicted on the other. *Mukh Bewa v. Jhotu Santia* (2) followed.

In this case one Raja Ram Singh was tried at one trial by a magistrate of the first class on two charges framed under section 506 and section 500 of the Indian Penal Code. He was acquitted on the former and convicted on the latter charge. The complainant, Muhammad Ali Khan, was ordered to pay compensation to the extent of Rs. 25 to Raja Ram Singh on the ground that

* Criminal Revision, No. 198 of 1918, from an order of S S. Nehru, Magistrate, First Class, of Azamgarh, dated the 29th of October, 1917.
 (1) (1888) I. L. R. 11 All. 27. (2) (1896) I. L. R., 24 Calb., 53.

the charge of criminal intimidation was frivolous or vexatious. Against this order Muhammad Ali Khan applied in revision to the High Court.

Maulvi *Iqbal Ahmad*, for the applicant.

Babu *Piari Lal Banerji*, for the opposite party.

PIGGOTT, J. :—Raja Ram Singh was tried at one trial by a magistrate of the first class on two charges framed under section 503 and section 500 of the Indian Penal Code. He was acquitted on the former and convicted on the latter charge. The complainant, Muhammad Ali Khan, has been ordered to pay a compensation of Rs. 25 to Raja Ram Singh on the ground that the charge of criminal intimidation was frivolous or vexatious. The question I have to determine is whether this order is legal in view of the fact that Raja Ram Singh was convicted on one of the two charges against him. I must take it that the complainant's case was that the two offences in question were committed in the course of one series of acts so connected together as to form the same transaction, otherwise they would have been separately charged and tried separately. The provisions of section 250 of the Code of Criminal Procedure will not apply to such a state of facts unless the Magistrate who tried the case discharges or acquits the accused altogether. The section speaks of "the case" as a whole, and contemplates a trial or inquiry ending in the unqualified acquittal or discharge of the accused. A complainant who, having a genuine grievance, wilfully exaggerates or distorts the same in order to aggravate the case against the accused is liable, in the discretion of the trial court, to be prosecuted for any offence against the Indian Penal Code which he may have committed; but the policy of the Legislature seems to be to limit the summary jurisdiction of the court under section 250 of the Code of Criminal Procedure to simple cases, in which the complainant is found to have been wholly in the wrong. There is authority for this view in the case of *Mukti Bewa v. Jhotu Santra* (1). I think that case was rightly decided and that it covers the facts now before me.

I set aside the order directing Muhammad Ali Khan to pay Rs. 25 as compensation. The money, if paid, will be refunded.

Order set aside.

(1) (1896) I. L. R., 24 Cal., 53.

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REVISIONAL CIVIL.

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Before Sir Henry Richards, Knight, Chief Justice, and Justice
Sir Pramada Charan Banerji.

JHUNKU LAL (DEFENDANT) v. BISIHESHAIR DAS AND ANOTHER
(PLAINTIFFS). *

Civil Procedure Code (1908), order XXIII, rule 1; section 115—Application by plaintiff to withdraw suit with leave to bring a fresh one made when hearing of suit was nearly concluded—Leave granted to bring fresh suit—Exercise of discretion—Revision.

A suit was instituted in the court of the Munsif. After the evidence had concluded and either during or after the argument, the plaintiffs applied for leave to withdraw with liberty to bring a fresh suit. They based their application upon the fact that they had failed to give formal proof of a plaint which was essential to their success. The court granted leave to bring a fresh suit. Upon an application in revision against this order: *held* that the court had jurisdiction to grant leave to the plaintiffs to bring a fresh suit, and the fact that the court may have exercised, and probably did exercise, a wrong discretion in granting the plaintiff's application was not sufficient to bring the case within the purview of section 115 of the Code of Civil Procedure.

IN this case the plaintiffs instituted a suit in the court of a munsif. After the evidence had been concluded, and either during or after the arguments, the plaintiffs applied for leave to withdraw, with liberty to bring a fresh suit. They based their application upon the fact that they had failed to give formal proof of a certain plaint which was apparently considered by the parties to be essential to the plaintiffs' success. The court granted leave to bring a fresh suit. The defendant thereupon applied to the High Court in revision under section 115 of the Code of Civil Procedure.

Munshi Panna Lal, for the applicant.

Babu Durga Charan Banerji, for the opposite parties.

RICHARDS, C. J.—This is an application in revision and arises under the following circumstances. The plaintiffs instituted a suit in the court of the munsif. After the evidence had concluded, and either during or after the arguments, the plaintiffs applied for leave to withdraw, with liberty to bring a fresh suit. They based their application upon the fact that they had failed to give formal proof of a certain plaint which was apparently considered by the parties to be essential to the plaintiffs' success.

* Civil Revision No. 217 of 1917.

The court granted leave to bring a fresh suit. The present application is made under section 115 of the Code of Civil Procedure. That section provides that "the High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit." It is argued on behalf of the applicant that the munsif acted illegally or with material irregularity in granting permission to bring a fresh suit. Order XXIII, rule 1, deals with the withdrawal and adjustments of suits. Rule 1 is as follows :—"At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim, where the court is satisfied—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may grant the plaintiff permission to withdraw with liberty to institute a fresh suit."

In support of the application the case of *Bai Kashibai v. Shidapa Annappa* (1), the case of *Khub Chand v. Ajodhya Prasad* (2), and the decision of their Lordships of the Privy Council in the case of *Watson v. The Collector of Rajsahye* (3) have been cited. I may say, speaking for myself, that I consider that a court ought to be very slow to give liberty to bring a fresh suit after a case has been heard out on the merits and probably an appellate court ought seldom or never to do so except where an application has been made to the first court and the appellate court thinks the first court should have granted the application. I do not think that it ever was intended that a plaintiff should have the power

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(1) (1918) I. L. R., 37 Bom., 682. (2) (1912) 11 A. L. J., 733.

(3) (1839) 13 Moo., I. A., 160.

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of trying out his case and then at the last moment asking for leave to withdraw with permission to bring a fresh suit. The mere ordering of the plaintiff to pay the defendant's costs does not compensate the latter for being sued a second time. But the real question before us is whether or not we can interfere in revision upon the ground that the Munsif either had no jurisdiction or that he exercised his jurisdiction with material irregularity. It will be noted that the rule is divided into two parts, first, where a suit fails for a "formal defect," and secondly, where there are "other sufficient grounds." It was for the Munsif to say whether or not there were "other sufficient grounds" in the present case. It is somewhat difficult to definitely decide that the absence of a witness could under no possible circumstance be "other sufficient grounds" within the meaning of the rule. However this may be, it seems to me that even if the Munsif be taken to have made a mistake in law, we nevertheless are not entitled to interfere in revision. In the very recent case of *Balakrishna Udayar v. Vasudeva Ayyar* (1) their Lordships dealing with section 115 of the present Code of Civil Procedure say as follows:— "It will be observed that the section applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved." In the Privy Council case referred to on behalf of applicant the original court had dismissed the plaintiff's suit, at the same time recording in its "proceedings" that the order was not intended to bar the plaintiffs from proceeding as if the action had not been brought. The question which their Lordships had to decide was whether the appearance of these words in the "proceedings" enabled the plaintiff to bring a fresh suit, notwithstanding the dismissal of the first one, the defendant having pleaded *res judicata*. Their Lordships incidentally, it is true, dealt with the meaning of the expression "sufficient cause" appearing in section 97 of Act VIII of 1859 and no doubt took the view that that section was not intended to allow or enable a plaintiff to bring a fresh

suit after it had been heard on the merits. I would reject the application.

BANERJI, J.—I also am of opinion that the application should be rejected but I would confine myself to this ground in rejecting it that it is not maintainable under section 115 of the Code of Civil Procedure. It cannot be said that the court below exercised a jurisdiction which was not vested in it by law. In the exercise of the jurisdiction which it undoubtedly had it may have committed an error, and apparently it did commit an error in the present case; but that alone would not justify this Court in interfering under section 115 as interpreted by their Lordships of the Privy Council in previous cases, and also in the recent case to which the learned Chief Justice has referred. This being so, the application for revision cannot in my opinion be entertained and must be rejected.

BY THE COURT.—The order of the Court is that the application is rejected with costs.

Application rejected.

REVISIONAL CRIMINAL.

Before Justice Sir George Knox.

HEET RAM v. GANGA SAHAI AND OTHERS *

Act No. XLV of 1860 (Indian Penal Code), section 494—Offence triable by Court of Session—Accused discharged—Order directing complainant to pay compensation—Criminal Procedure Code, section 250—Judgment written by magistrate

Section 250 of the Code of Criminal Procedure is not applicable where the charge which is being inquired into by a magistrate is one which is exclusively triable by a Court of Session. Neither in such a case is the magistrate empowered to write a judgment, all that he is empowered to do is to record reasons for a discharge, if he make such an order, and to pass the order of discharge. *Fattu v. Fattu* (1) referred to

A MAGISTRATE of the first class was inquiring into a charge against certain persons under section 494 of the Indian Penal Code. There were also subsidiary charges under sections 363 and 420 of the Code. The Magistrate wrote a more or less lengthy judgment, in which he criticized the evidence with great

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* Criminal Reference No. 135 of 1918.

(1) (1904) I. L. R., 26 All., 564.

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minuteness, and wound up by discharging the accused. He also passed an order, purporting to be under section 250 of the Code of Criminal Procedure, directing the complainant to pay compensation to the accused. With reference to this latter order the Second Additional Sessions Judge of Aligarh referred the case to the High Court, recommending that the order should be set aside as illegal.

Mr. C. J. A. Hoskins, for the applicant.

Mr. Nihal Chand, for the opposite parties.

KNOX, J. :—This is a reference made by the Second Additional Sessions Judge of Aligarh. He sends us an order passed by a first class Magistrate of Etah ordering the discharge of several persons accused before him and directing the complainant to pay compensation to the accused persons. The order directing payment of compensation is undoubtedly, to my mind, illegal and must be set aside. The offence with which the accused were charged was really an offence under section 494 of the Indian Penal Code; sections 363 and 420 of the Indian Penal Code, which were added as sections under which the accused were alleged to be guilty, were mere appendages to the original section. The Magistrate had no jurisdiction to try the offence under section 494 of the Indian Penal Code. Sections 250 and 253 of the Code of Criminal Procedure are to be found one in a chapter which deals with the trial of summons cases by a Magistrate, and the other in a chapter dealing with the trial of warrant cases by Magistrates. This was neither a summons nor a warrant case. All that the first class Magistrate had jurisdiction to do in a case of a charge of an offence under section 494 of the Indian Penal Code was to follow the procedure laid down by chapter XVIII of the Code of Criminal Procedure. In that chapter neither section 250 nor section 253 finds any place. The order directing payment of compensation is set aside and the compensation or such part of it as may have been paid will be at once refunded.

In going into the case, however, a more important question arises and that is whether the Magistrate, Babu Brij Nath Ugra, was justified in discharging the accused. I hold that he was not. He has evidently misconceived the purpose and the intention of

judgment in the case. Now if the learned Magistrate will look at section 209 he will find that he is not authorized to write a judgment in a case triable by a Court of Session; all that he is empowered to do is to record reasons for a discharge if he make such an order and to pass the order of discharge. This Court has gone into the matter at considerable length in the case of *Fattu v. Fattu* (1). The learned Magistrate has done exactly what this Court in the case cited above condemned. He has criticized the evidence given with painful minuteness. He has found it entirely unreliable and worthless, and he has written a paragraph saying that he is dealing with the complainant for making a malicious complaint without any foundation to harass the accused. The case has to be thoroughly inquired into. A thorough and complete inquiry has not been made. I set aside the order of discharge and I return the case to the District Magistrate of Etah who will direct Babu Brij Nath Ugra, if he is still there, or some other Magistrate competent to hold inquiry, to take any further evidence that may be offered, to examine the accused, and to commit them to the Court of Session for trial.

Order set aside.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

LALTA PRASAD CHAUDHRI (PLAINTIFF) *v.* GOKUL PRASAD

AND OTHERS (DEFENDANTS) *

Pre-emption—Custom—Wajib-ul-arz—Right of pre-emption acquired by means of imperfect partition of the village.

There being a pre-existing custom of pre-emption in a village, a right of pre-emption may arise in favour of an individual co-sharer just as much by the creation of a new patti by imperfect partition as by purchase by the co-sharer of a share in the patti. *Mahadeo Prashad Sahu v. Jaipal Bant* (2) dissented from.

THE *wajib-ul-arz* of a village, framed in 1860, afforded evidence of a custom of pre-emption existing in the village, the first right being to *hissadlar-i-karibi*, or co-sharers in the same sub-division of the village. Some time subsequent to 1860,

* Second Appeal No. 6 of 1917, from a decree of Gopal Das Mukerji, Additional Subordinate Judge of Gorakhpur, dated the 28th of September, 1916, reversing a decree of Girish Prasad, Munsif of Bansi, dated the 29th of January, 1916.

(1) (1904) I. L. R., 26 All., 564. (2) (1910) 8 Indian Cases, 867.

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the village was divided by imperfect partition. A share in one of the new patti so formed was sold and a suit for pre-emption was brought by a co-sharer in the same patti. The court of first instance gave the plaintiff a decree. The lower appellate court reversed the decision of the first court solely on the ground that the plaintiff's being in the same patti as the vendor was due to imperfect partition. The plaintiff appealed to the High Court.

Mr. J. Simeon, for the appellant.

Munshi Gulzari Lal, for the respondent.

RICHARDS, C.J. and TUDBALL, J.:—This appeal arises out of a suit for pre-emption. The plaintiff is a co-sharer in the same patti with the vendor, but the patti was created by imperfect partition and in more recent years. There seems to be no dispute that a custom of pre-emption prevails in the village. The entry in the *wajib-ul-arz* of 1860 gives the first right to *hissadur karibi* and both courts were of opinion that this meant that the co-sharer in the same subdivision as the vendor would have a preference over a co-sharer in another subdivision. The court of first instance decreed the plaintiff's claim. The lower appellate court reversed the decision of the court of first instance solely on the ground that the plaintiff's being in the same patti as the vendor was due to imperfect partition. It referred to the case of *Mahadeo Prashad Sahu v. Jaipal Raut* (1). We do not agree with the decision in this case. It seems to us that where a custom is proved and the plaintiff can show that he comes within the custom at the time of the sale he is entitled to the benefit of the custom. The mere fact that he was not within the custom prior to partition does not prevent him from subsequently acquiring the right. For example it can hardly be said that if a co-sharer acquired a share in a patti by sale that he would not have the right of a co-sharer in that patti upon a sale subsequently made by one of the co-sharers. The rights which the plaintiff acquired by imperfect partition were just as binding upon the co-sharers as if he had acquired the right by sale. We must allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance with costs in all courts.

Appeal allowed.

(1) (1910)'s Indian Cases, 867.

Before Mr. Justice Piggott and Mr. Justice Walsh

LACHHMI KUNWAR (DEFENDANT) *v* DURGA KUNWAR (PLAINTIFF).*

Hindu law—Joint Hindu family—Partition—Agreement for partition of property of their husbands executed by two widows—Circumstances invalidating such agreement

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Two brothers, constituting a joint Hindu family, died within a year of each other, each leaving a widow surviving him. The two widows executed a deed of partition of the property of their husbands, in which it was recited that the husbands had died on certain dates, that they had been joint "in food, business and everything," but also, nevertheless, that the executants "became the owners of the property left by their husbands in equal shares." The property was never physically divided, and some time later the widows brought two suits—the one asking for actual partition according to the deed, and the other (the widow of the brother who died last) for possession of the whole estate.

Held that the latter was entitled to succeed. Either the gratuitous alienation by her of one half of the property to which she was entitled was the result of deception practised upon her by some one better acquainted with the facts, or else both parties to the deed of partition were under a common mistake regarding their respective rights.

THE facts of the case are fully set forth in the judgment. Briefly stated, they were as follows:—

Nathmal Das and Pem Raj were two brothers. Nathmal Das died, leaving a widow, Musammat Lachhmi Kunwar, and her name was entered in the village papers in respect of the property which had stood in her husband's name. Within a year, Pem Raj died, leaving a widow, Musammat Durga Kunwar, besides daughters. Musammat Durga Kunwar's name was entered in respect of the property which had stood in Pem Raj's name. A few months later the two widows executed and got registered a partition deed in which it was set out that the two brothers had been joint till death, that after their death the two executants became the owners in equal shares of the property left by the two brothers, and that the property had now been apportioned between themselves in two equal lots which were specified. About a year later disputes arose between them, and they filed two cross-suits against each other. Musammat Lachhmi Kunwar set out in her plaint that she had been authorized by her husband to adopt a son, that she wished to do so, that thereupon disputes arose with Musammat Durga Kunwar regarding the property,

* First Appeal No. 78 of 1917, from a decree of Shams-ud-din Khan, First Additional Subordinate Judge of Aligarh, dated the 29th of February, 1918.

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that the matter was referred to arbitrators who made an award, and that the partition deed was executed in accordance with that award. She prayed for a declaration of her right to separate possession of the property allotted to her by the partition deed. Musammât Durgâ Kunwar in her plaint stated that on the death of Nathmal Das, Pem Raj became by survivorship the owner of the whole property; that upon the death of the latter she became entitled to the whole property, and that the partition deed was not binding on her, inasmuch as her signature had been obtained by fraud and in ignorance of the nature of the deed and of her legal rights. The court found in favour of the allegations of Musammât Durgâ Kunwar, and decreed her suit and dismissed the other. Musammât Lachhmi Kunwar appealed.

Mr. B. E. O'Connor (with him Maulvi S. Abdullah), for the appellant, after discussing the evidence, submitted that the lower court had considered the case from a wrong point of view. The deed of partition was executed by both the widows, and it was binding on the parties as a family settlement. The question to be considered was not what the actual rights of the parties were at the time when that deed was executed, but whether there was a dispute between, or doubt in the minds of, those parties as to their respective rights, which dispute or doubt was settled by means of the partition deed. Therefore, the question was not whether the two brothers were, as a matter of fact, joint or separate, but whether there was not a dispute on that point. As regards the threat of adoption the question similarly was, not whether if made it would divest the estate of Musammât Durgâ Kunwar, but whether she could have been influenced by the idea of a possible adoption divesting her whole estate, into giving up half the property in order to avoid a dispute. It was well established that a family settlement had to be examined not in the light of what a court of law would decide on the matters in question, but what the members settling the matters might have reasonably thought their rights to be.

Babu Piarî Lal Banerji, for the respondents :—

It has been found, and in fact it was set out in the partition deed itself, that the two brothers were joint. Assuming that Musammât Durgâ Kunwar did execute the deed as a free and

intelligent agent, she purported to do so on the assumption that the two widows were entitled to equal shares. Consequently if she was made to believe that where two brothers were joint their widows succeeded to equal shares, that altogether vitiates the settlement. Further, as a matter of law, if Musammat Lachhmi Kunwar had made an adoption to Nathmal Das after the estate had vested in Musammat Durga Kunwar the adoption would have been invalid and would not have divested Musammat Durga Kunwar. *Chandra bin Bhanu v. Gajarabai* (1), *Ramkrishna v. Shamrao* (2) and *Advi Suryaprasada Rao v. Nidamarty Gangaraju* (3). If, therefore, Musammat Durga Kunwar was made to believe that such an adoption would divest her estate and she entered into the settlement under such belief, it would not be binding on her. In deciding whether the deed of partition is binding upon Musammat Durga Kunwar, the court has to consider not only whether she knew what she was executing, but also the circumstances which induced her to enter into the transaction.

Mr. B. E. O'Connor was heard in reply.

PIGGOTT and WALSH, JJ.:—The litigation leading to these two first appeals arises out of the following state of facts. One Kundan Lal had two sons, Nathmal Das and Pem Raj. Nathmal Das died in the month of June, 1913, leaving no children surviving him but a widow, Musammat Lachhmi Kunwar, who is the appellant in both the appeals now before us. Pem Raj died in the month of February, 1914. He left no son, but he left daughters, and a widow, Musammat Durga Kunwar, who is the respondent in both these appeals. It is a matter of some significance that there are now living sons of the aforesaid daughters of Pem Raj by the respondent Durga Kunwar. On the 29th of July, 1914, the two widows presented themselves outside the office of the Sub-Registrar at Khurja. Musammat Lachhmi Kunwar there tendered for registration a certain document which is printed at A 20 and the following pages of our record of first appeal No. 80 of 1916. The Sub-Registrar read over this document to the two ladies, who were sitting concealed from the public gaze behind the

(1) (1890) I. L. R., 14 Bom., 468. (2) (1902) I. L. R., 26 Bom., 526

(3) (1908) I. L. R., 33 Mad., 228

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curtains of a bullock cart. Each lady was identified by an own brother there present for that purpose. The Sub-Registrar read over the document and both ladies admitted execution. The document was then registered. It commences with a recital to the effect that the two brothers, Nathmal and Pem Raj lived jointly, which is followed up by the emphatic amplification that "they were joint in food business, and everything." It is then admitted that Nathmal Das died first and Pem Raj after him; but upon this admission follows the curious recital that the two executants of the document, the widows of the aforesaid brothers, "became the owners of the property left by our husbands in equal shares." On this basis the two executants proceed to a detailed division and apportionment of the estate which originally belonged to Nathmal Das and Pem Raj between themselves. It is not denied that the apportionment is a fair one on the basis on which it proceeded, namely, on the assumption that the two executants were the owners of the property in equal shares. About a year later a dispute broke out upon applications made by both ladies for a succession certificate in respect of the collection of certain debts due to their husbands. The necessary certificate was eventually granted to Musammat Durga Kunwar, for reasons with which we are not concerned, but the dispute over this matter led to the institution of two distinct suits. In each case one of the widows came into court as plaintiff and impleaded the other as defendant. Musammat Lachhmi Kunwar asked for a declaration affirming her right to separate possession and enjoyment of the property allotted to her by the deed of the 29th of July, 1914, already referred to. In her plaint she states that on the death of each of the brothers their respective widows had entered into possession and enjoyment each of the undivided share in the family property belonging to her own husband. She then suggests that a dispute had arisen because she, Musammat Lachhmi Kunwar, had been authorized by her late husband to adopt a son to him and was proposing to exercise the right. Hence there was a reference to arbitration and a division of the property between the two ladies was effected by two arbitrators named in the plaint. The deed of the 29th of July, 1914, was drawn up on the basis of the division made by these arbitrators. It was duly executed

by both the parties, and Musammat Lachhmi Kunwar claims that it is binding upon the widow of Pem Raj. Musammat Durga Kunwar sues for a declaration that she is in no way bound by this document, that she is in law the owner of the entire property which had formerly belonged to the two brothers, Nathmal Das and Pem Raj, and is entitled to be put and maintained in possession of the same in spite of anything contained in the partition deed already mentioned. Her case against that document is set forth in paragraphs 9 and 10 of her plaint, the essential portions of which it seems worth while to reproduce in detail.

"The plaintiff has not executed any deed of partition, nor did the plaintiff understand her legal rights, nor was there any opportunity to understand them. If the defendant took unlawful advantage of the plaintiff's position improperly on the strength of her brothers and obtained any document from the plaintiff on false allegations, such proceedings cannot be binding upon the plaintiff, nor can the defendant benefit from such proceedings and documents. The plaintiff is a *pa'danashin* lady and is illiterate and hard of hearing. She has no knowledge of zamindari affairs and legal rights. Moreover, she did not get an opportunity to make inquiries owing to grief."

In the evidence which she gave in court Musammat Durga Kunwar went the whole length of setting up a case of fraud pure and simple. She said that the brothers of Musammat Lachhmi Kunwar having secured the assistance of her own brother, took her to the tahsil at Khurja, telling her that certain arrangements were being made about the lambardarship of the landed property. She was too hard of hearing to be able to understand any document from its merely being read over to her, but she had been told that she must say "yes" in reply to any question that might be asked her and must put her thumb-impression to any paper which might be placed before her for that purpose. In this way she accounts for the execution of the deed in question. There has been a good deal of conflicting evidence in the court below, but the learned Subordinate Judge has made up his mind to go the whole way with Musammat Durga Kunwar and has substantially found in favour of her all grounds of fraud as made in her evidence. In appeal we have been asked to consider rather what would be the position of Musammat Durga Kunwar in respect of this document, even assuming that she executed it after understanding its contents

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and its general effect as dividing the family property equally between herself and Lachhmi Kunwar. The first question which comes up for consideration in this connection is that of the jointness or separation of Nathmal Das and Pem Raj. There was a distinct issue upon this point in the court below and a good deal of conflicting evidence was produced, but the learned Subordinate Judge has come to a clear finding that the brothers were members of a joint undivided Hindu family at the moment of the death of Nathmal Das. This finding is not challenged in the memorandum of appeal which Musammat Lachhmi Kunwar has filed in identical terms in each of the two cases. It is unnecessary therefore for us to go into the evidence upon which it rests, beyond remarking that there certainly was evidence to support it, including Musammat Lachhmi Kunwar's own admission in the disputed document of the 29th of July, 1914. We must take it therefore that when Nathmal Das died the whole of what had been the joint family property of himself and his brother passed by survivorship to Pem Raj. Musammat Lachhmi Kunwar retained nothing in law except a right to maintenance. When Pem Raj died the estate, vested by inheritance in his widow, Musammat Durga Kunwar. The question then is whether this lady is bound by a gratuitous alienation of one-half of this property, effected on the basis of a document which starts with the recital that she and Musammat Lachhmi Kunwar are the owners of the property in question in equal shares. This recital is wrong upon the facts. If Musammat Durga Kunwar was induced to believe it to be true by anyone better acquainted with the facts, she is entitled to relief against this document on the ground that she was deceived into executing it and that she executed it without such knowledge of the facts and of her true position as would be necessary in order to bind a *pardanashin* lady in a transaction of this sort. If, on the other hand, both the parties to the document were under a mistaken impression as to their ownership, the contract in question is liable to be set aside on the ground of common mistake, if upon no other. From this point of view the position seems clear enough. The best that could be said on behalf of Musammat Lachhmi Kunwar has been to contend that the document in question represents in some way a reasonable settlement of a *bona fide* dispute. That dispute can scarcely have been

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on the question whether Nathmal Das and Pem Raj were joint or separate, when the document itself recites that they were joint. In Musammat Lachhmi Kunwar's plaint and also in some of the evidence led by her, an attempt was made to suggest that there was a *bond fide* dispute between the parties of quite a different kind. The suggestion is that Musammat Lachhmi Kunwar was proposing to adopt a son to her deceased husband, that the effect of this adoption would be to deprive Musammat Durga Kunwar of the estate held by her as widow of Pem Raj, or at least of one-half of the estate, and that, in order to avoid a dispute upon this point and to make sure that any adoption which Lachhmi Kunwar might effect would not give the adoptive son more than one-half of the estate, she was induced to enter into the transaction in question. Whether the evidence on the record would bear out this plea, as a matter of fact, assuming that it proceeded upon correct propositions of law, is an arguable question. The plea may be disposed of upon the ground that it does not proceed upon a correct proposition of law. It is sufficient to refer to two cases, *Chandra bin Bhau v. Gojara-bai* (1) and *Adivi Suryaprakasa Rao v. Nidomarty Gangaraju* (2), as authority for the proposition that any adoption which Musammat Lachhmi Kunwar might make, or might purport to make, to her deceased husband, after that husband and his surviving brother were both dead, could not affect the rights of Musammat Durga Kunwar who had inherited the estate as widow of Pem Raj. Nor could such adoption affect the rights of the reversioners: that is to say, the estate would pass on the death of Durga Kunwar to the reversionary heirs of Pem Raj, and the same according to the evidence on the record would probably be, first, his daughter or daughters, and eventually the sons of the said daughters. One of the points against the appellant in these cases is that, from any point of view, the alienation purporting to be effected by Musammat Durga Kunwar of one half of the estate under the agreement in dispute could not possibly stand against a suit by the reversionary heirs of Pem Raj. In the view which we take of the case and of the law applicable to the established facts, it is not necessary for us to go the whole length of the finding upon which the court below has disposed of the two suits. We think that the decision of the court

(1) (1890) I. L. R., 14 Bom., 433. (2) (1908) I. L. R., 33 Mad., 228

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below is correct; that Musammatt Durga Kunwar is not bound by this agreement and is entitled to succeed in her claim to the possession of the entire property. Both these appeals therefore fail and we dismiss them with costs.

Appeal dismissed.

1918
May, 9.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tullall.

SUNDAR KUNWAR (Plaintiff) v RAM GHULAM AND OTHERS
(Defendants).*

Pre-emption—Wajib-ul-arz—Custom—Mortgage by conditional sale.

In 1895 a mortgage was made consolidating previous mortgages of the years 1892, 1893, and 1894. In 1906 a suit was instituted on the mortgage which was construed as a mortgage by way of conditional sale. A decree for foreclosure was obtained, and in 1911, the decree was made absolute. Shortly after possession was obtained under this decree. In 1914 a suit was brought claiming to get possession by virtue of a custom set forth in the *wajib-ul-arzes*. The clause relating to pre-emption was as follows:—"If a *pattidar* wishes to transfer his share by sale or mortgage, he should do so first, to another *pattidar* of the same *thok*, and in case of his refusal, to the *pattidars* of another *thok* of the village. If the *pattidar* wants to sell his share to a stranger by entering an excessive and fictitious price, the *pattidar* having the right of pre-emption shall be entitled to acquire the property on payment of the price awarded by the arbitrators." The thing in question was the whole content of the *wajib-ul-arzes* the "rule" mentioned therein for the purpose of giving rise to a right of pre-emption according to custom meant a voluntary sale and the *wajib-ul-arzes* did not give him a right of pre-emption under the circumstances under which the mortgagee became the owner of the property. *Alu Prasad v Sukhan* (1) distinguished.

THE facts of this case were shortly, as follows:—

In the year 1894 the owner of the property mortgaged it. There had been two prior mortgages, in 1892 and 1893. The mortgage of 1894 was a consolidation of these mortgages with a further advance. This mortgage was again consolidated by a last mortgage in the year 1895. It was in form what is called a simple mortgage, except for the last clause, which provided that if the period mentioned in the mortgage expired and the money had not been paid up the document should be treated as a sale. In the year 1906 a suit was instituted on this document treating it as a mortgage by

* First Appeal No. 151 of 1916, from a decree of Piare Lal Katara, Subordinate Judge of Mainpuri, dated the 28th of February, 1916.

(1) (1881) I.L.R., 3 All., 610.

conditional sale and a decree for foreclosure was obtained. This decree was made absolute in the year 1911, and shortly after that the decree-holder mortgagee obtained possession. In the year 1914 the present suit was instituted, the plaintiff claiming to get possession of the property by virtue of a custom set forth in the *wajib-ul-arzes* appertaining to the various villages. The court below dismissed the plaintiff's suit.

The pre-emptor appealed to the High Court

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *J. M. Banerji*, for the appellant.

Mr. *B. E. O'Connor*, for the respondents.

RICHARDS, C.J., and TUDBALL, J.:—This appeal arises out of a suit for pre-emption. The facts may be very shortly stated. In the year 1894 the owner of the property mortgaged it. There had been two prior mortgages, in 1892 and 1893. The mortgage of 1894 was a consolidation of these mortgages with a further advance. This mortgage was again consolidated by a last mortgage in the year 1895. This mortgage will be found printed at page 9 of the respondents' book. It was in form what is called a simple mortgage, except for the last clause, which provided that if the period mentioned in the mortgage expired and the money had not been paid up the document should be treated as a sale. In the year 1906 a suit was instituted on this document treating it as a mortgage by conditional sale and a decree for foreclosure was obtained. This decree was made absolute in the year 1911, and shortly after that the decree-holder mortgagee obtained possession. In the year 1914 the present suit was instituted, the plaintiff claiming to get possession of the property by virtue of a custom set forth in the *wajib-ul-arzes* appertaining to the various villages. The court below dismissed the plaintiff's suit. The pre-emptor has appealed.

The custom as recorded in the several *wajib-ul-arzes* does not materially differ from the *wajib ul-arz* for Mauza Patti Yakubpur. It is as follows :—“ If a *pattidar* wants to transfer his share by sale or mortgage, he should do so first to another *pattidar* of the same *thok*, and in case of his refusal to the *pattidars* of another *thok* of the village. If he (the *pattidar*) wants to sell his share to a stranger by entering an excessive and fictitious

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price the *pattidar* having the right of pre-emption shall be entitled to acquire that property on payment of the price awarded by the arbitrators appointed privately or by the court."

We think (subject to what may be said having regard to certain authorities which have been quoted) that the question which the court had to consider was whether or not the plaintiff proved by this record the existence of a custom which entitled him to get possession of the property under the circumstances of the present case as set forth above. We may here point out that the mortgages in the present case were made after the passing of the Transfer of Property Act. Even assuming that the mortgage of 1895 was in reality a mortgage by conditional sale as defined by section 58 of the Transfer of Property Act, it was one of the modes recognized by the Act itself by which an owner mortgages his property. If one reads again the extract from the *wajib-ul-arz*, which we have quoted above, it can hardly be doubted that the sale referred to in the *wajib-ul-arz* was the ordinary voluntary sale which a co-sharer makes. This is clear from the language of the *wajib-ul-arz* itself. It begins by stating that if he "wishes," which we take to mean "has necessity" to sell, he must do so to another *pattidar* in the same *thok*, etc. Again, the reference to price shows that the sale referred to was the voluntary sale of the co-sharer. If he was observing the custom, the moment he wanted to sell his duty would be to go to the other co-sharers as recorded in the *wajib-ul-arz*. The very same remark will apply to the mortgage. If the transaction was a mortgage then his duty, if he observed the custom, was to first ask the other co-sharers if they would take a mortgage of the property. In either case it would seem that the right of pre-emption in case of non-observance of the custom was to step into the shoes of the vendee in the case of a sale and in case of a mortgage to step into the shoes of the mortgagee. Now let us consider for a moment what the pre-emptor did in the present case. He never sought to step into the shoes of the mortgagees of 1892 and 1893. He never sought to step into the shoes of the mortgagees of 1894 and 1895. He waited until about three years after the defendant had obtained possession of the property in

due course of law through the intervention of the court, and the suit was brought something like nineteen or twenty years after the latest mortgage transaction. We are perfectly satisfied that the plaintiff in the present case failed to prove by the production of these extracts from the *wajib ul-arz* the existence of a custom which gave him a right to get the property under the circumstances. It is true, no doubt, that the mortgagee eventually became the owner of the property, but there never was a "sale" of the nature referred to in the *wajib-ul-arz*.

A great difficulty is created in the case by the ruling of the Full Bench in the case of *Alu Prasad v. Sukhan* (1). In that case the mortgage had been made prior to the passing of the Transfer of Property Act of 1882. The majority of the Court in the case, no doubt, held that the pre-emptor had a right of pre-mortgage when the original transaction took place, and that he had a further right of pre-emption when that mortgage ripened into a complete sale after the expiration of the period of grace which was prescribed for by the regulation. The case was argued before that Bench on a different basis from the arguments in this Court. We think that the decision of the Court must have reference to the custom which the court finds to exist in each case, and if in the present case after considering the evidence we do not believe, or do not consider, a custom to be "proved" (see definition in the Evidence Act of the expression "proved") to exist which entitles the pre-emptor to get the property under the circumstances of the present case, we are not bound simply by reason of the Full Bench case to give the plaintiff a decree. We may mention here as having a distinct bearing upon the question of the existence or non-existence of such a custom a case which was decided by this Bench, namely S. A. No 252 of 1911, decided on the 7th of July, 1911. In that case the custom as recorded in the *wajib-ul-arz* expressly provided for pre-emption upon ordinary sale and conditional sale. The record was as follows:—

"If any co-sharer wishes to sell conditionally or absolutely his share, he can transfer it for the price that may be offered him by others, first, to a near co-sharer, next, to other co-sharers in the *patti*, and in case of their refusal to his near co-sharers in other *pattis*; should they also refuse, then to others in the

(1) (1881) L.L.R. 3 All., 610.

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mahal, and lastly to a stranger. If the share of any co-sharer be mortgaged or sold conditionally to a stranger and he be unable to redeem, then any of the co-sharers in his *patti* may if the term of the mortgaged share is about to expire, pay up the money and take possession, and when the mortgagor or his heir has paid the money in accordance with the condition of the deed between the original mortgagor and the co-sharer with title he may enter into possession."

We were also referred to a decision of their Lordships of the Privy Council in which, under circumstances very like the present, the pre-emptor got a decree for pre-emption. The only question, however, which was argued before their Lordships of the Privy Council was one of limitation, namely the article of the Limitation Act which was applicable to the circumstances of the case, and they simply held that article 120 governed that case because physical possession was an impossibility. Finding, as we do, in accordance with the court of first instance, that no custom was proved entitling the plaintiff under the circumstances of the present case to get the property by pre-emption we think that the decree of the court below was quite correct. In our opinion the deed of 1895, made as it was after the passing of the Transfer of Property Act, was a "mortgage" and the plaintiff's right arose in 1895 to step into the shoes of the mortgagee.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Justice Sir George Knox, and Justice Sir Pramada Charan Banerji.

1918
May, 10.

KALKA BAKHSH SINGH AND OTHERS (JUDGMENT-DEBTORS) v. RAM
OHARAN AND OTHERS (DECREE-HOLDERS).*

Act No. IX of 1908 (Indian Limitation Act) schedule 1, article 182 (6) and section 7—Execution of decree—"Date of issue of notice"—Minority—Supervention of a minority after limitation has commenced to run.

Held, on a construction of article 182 (6) of the first schedule to the Indian Limitation Act, 1908, that the expression "the date of issue of notice" must be taken as the date on which the order of the court directing that notice be issued to the judgment-debtor is passed.

He also, that when the decree-holders are all of full age at the time of the passing of the decree execution of which is sought and limitation has

*First Appeal No. 285 of 1917, from a decree of Kunwar Sen, Subordinate Judge of Allahabad, dated the 24th of April, 1917.

already commenced to run, the subsequent intervention of a minority does not entitle the decree-holders to the benefit of section 7 of the Indian Limitation Act, 1908. *Bhagat Bihari Lal v. Rani Nuth* (1) referred to. *Zami Hasan v. Sundar* (2) distinguished.

THE facts of this case were as follows :—

A decree under order XXXIV, rule 6, of the Code of Civil Procedure having been passed on the 4th of March, 1911, the decree-holders applied for execution of the decree on the 3rd of March, 1914, and on the same date the court ordered notices under order XXI, rule 22, to issue to the judgment-debtors. The notices were actually drawn up and signed on the 4th of March, 1914, which was the date they bore. The application for execution was eventually struck off on the 24th of March, 1914. The next application for execution was made on the 5th of March, 1917, by one of the original decree-holders and the heirs, among whom there were some minors, of the other two decree-holders who had died in the meantime. The 4th of March, 1917, was a Sunday. The judgment-debtors objected that the application was beyond time. The court held that it was within time. The judgment-debtors appealed to the High Court.

Munshi *Panna Lal* (with him Munshi *Balmakund*), for the appellants :—

Under clause (6) of article 182 of the first schedule to the Limitation Act the decree-holder is entitled to 3 years from the date of issue of the notice referred to therein, that is, the notice under order XXI, rule 22, of the Code of Civil Procedure. The question is, what is the exact date signified by the phrase "date of issue of notice?" That date is the date on which the court orders notice to issue, and not any subsequent date on which the office may choose to prepare and send out the notice. The Legislature must have intended to refer to a judicial act as giving a starting point for the period of 3 years, and not to a merely ministerial act. According to this construction, the period of 3 years furnished by clause (6) of article 182, started on the 3rd of March, 1914, and expired on the 3rd of March, 1917, and the present application for execution is beyond time.

Under the corresponding provision of Act IX of 1871, namely clause (5) of article 167, it was held by the Allahabad

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(1) (1905) T. R. 27 All. 704

(2) (1899) L. D. R., 22 All. 199.

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High Court that the "date of issuing notice" meant the date on which the court passed an order directing notice to issue; *Udit Narain v Rampartab* (1). That view has consistently been followed in this Court, under the corresponding article 179, clause (5), of Act XV of 1877; *Buldeo v. Harrison* (2), *Jumar Kunjar v. Abdul Karim Khan* (3). The same view has been taken by the Bombay High Court; *Danodhar Shaligram v. Sonaji* (4), *Govind v. Dada* (5). In Calcutta, there seem to have been inconsistent decisions. The cases of *Kadaressur Sen v. Mohim Chandra* (6) and *Ratan Chand v. Deb Nath* (7) have adopted the interpretation that the date of *actual issue* of the notice is the date from which the period of 3 years is to be reckoned. But in the case of *Jugol Kishore v. Chintamani* (8) the Calcutta Court took the same view as this Court. The Madras High Court has taken the opposite view; *Cheruvath Thalungal Babu v. Nerath Thalangan Kanaram* (9). In the present Act, article 182, clause (6), there has been a slight alteration in the language; in the older Acts the words were "date of issuing notice," and in the present Act they are, "date of issue of notice." There is really no significance in this alteration, but if it indicates anything, it goes to strengthen the view of the Allahabad High Court. Of the two words, "issuing" and "issue," the former is, if at all, the more suggestive of the actual operation of issuing the notice than the latter; and so the change favours the Allahabad view.

Since the passing of the present Act there has been a decision of the Patna High Court, in the case of *Ram Kumar Lal v. Kesho Prasad Singh* (10), in which on a review of the various former decisions the view held by the Allahabad Court was approved. The case reported in 24 I. C., 80, already cited, was also a decision under the present Act. In the case of *Maharaja of Jaipur v. Lalji Sahai* (11) a single Judge of this Court was inclined to the

- (1) Weekly Notes, 1881, p. 120. (6) (1902) 6 C. W. N., 656.
 (2) Weekly Notes, 1890, p. 244. (7) (1906) 10 C. W. N., 903.
 (3) (1908) I. L. R., 80 All., 586. (8) (1914) 24 Indian Cases, 80; 20 C. L. J., 15.
 (4) (1908) I. L. R., 27 Bom., 622. (9) (1906) I. L. R., 30 Mad., 30.
 (5) (1904) I. L. R., 28 Bom., 416. (10) (1916) 36 Indian Cases, 990.
 (11) (1914) 12 A. L. J., 1006.

view that the change in the language indicated that the date which the notice bore on it ought to be the date from which time was to be reckoned. This view, however, was merely an *obiter dictum*, as it was unnecessary for the decision of the case, which was actually decided on another ground. Having regard to the long and well-established course of decisions of this Court, the view adopted by it should be maintained unless and until there is an express enactment, or at least a clear indication of intention, of the Legislature to the contrary. The alteration in the language falls far short of either.

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Babu Piari Lal Banerji (with him Babu Saila Nath Mukerji), for the respondents:—

It is submitted that the view taken by this Court on the wording of the older Acts was erroneous, and the Legislature has now indicated by the use of the words "date of issue of notice" that the interpretation put by this Court on the corresponding words of the older Acts was wrong. There are several reasons for holding that the Legislature could not have contemplated giving a fresh starting point from the date of the order directing notice to issue. The date of application for execution gives a fresh starting point under clause (5), and by clause (6) the intention was to give another starting point which would make a substantial difference. Ordinarily, the order directing notice to issue is passed on the very day the application for execution is filed; in some cases it is made the day following. It would not be reasonable to suppose that the Legislature would enact a separate clause giving a fresh starting point if the difference between the two starting points was only a day or so. Again, after the order is made, the decree holder can pay in the process fee and ask that the notice be sent. This act of his would be an application to take a step in aid of execution, as has been indicated in the cases of *Thakur Ram v. Katwaru Ram* (1) and *Sheo Prasad v. Indar Bahadur* (2), and would give him a fresh starting point under clause (5). The Legislature having already given the decree-holder a fresh starting point from the later date of the payment of process fee, could not reasonably have intended to give him another starting point from

(1) (1900) I. L. R., 22 All., 853. (2) (1903) I. L. R., 30 All., 179.

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the earlier date of the order directing notice to issue, as it would be of no use to him and would never be required to be availed of. It is, therefore, submitted that the view adopted by the Calcutta and Madras High Courts is the correct view. I rely on *Chervath Thalungal Bapu v. Nerath Thalung n Kanuran* (1), *Kutareswar Sen v. Mohim Chandra* (2) and *Ratan Choud v. Dev Nath* (3). This view was accepted by PIGGOTT, J., in *Maharaja of Jaipur v. Lalji Sahai* (4). It was also accepted by the Patna High Court in the latest case—*Khoda Bukhsh v. Bahadur Ali* (5) in which the earlier Patna case, cited by the appellants was considered. The earlier Allahabad cases give no adequate reasons for the view taken; and the Bombay High Court view is untenable. The latter Court has held that clause (6) can only apply when notice has actually been sent, and not where only an order for the issue thereof has been made, *Hari Ganesht v. Yamunabai* (6). It, therefore, expressly holds that the mere ordering of notice to issue is not issuing the notice, yet it goes on to hold, following the Allahabad cases, that the date of ordering is the "date of issuing" the notice. It gives two different meanings to the same word "issue" occurring in two places in the same sentence. The words "date of issue" of notice mean the date which the notice bears, just as date of issue of a currency note means the date which the note bears. There is another reason why the application for execution is within time. Some of the decree-holders applicants are minors, and consequently the bar of limitation does not arise. Reference was made to *Zamir Hasan v. Sundar* (7) and *Sri Ram v. Het Ram* (8).

Munshi Panna Lal, in reply :—

The fact that some among the present appellants, whose right to apply for execution accrued after the date of the first application for execution are minors, would not suspend limitation, as time had already commenced to run from the 3rd of March, 1914, and no subsequent disability could stop it—subsequent disability is to be distinguished from a case of initial

(1) 1908 11 L.R. 20 Mad. 80. (5) (1918) 45 Indian Cases. 908.

disability. Reference was made to *Bhagat Bihari Lal v. Ram Nath* (1), *Jivraj v. Babaji* (2) and *Bhagwant Ramchandra v. Kaji Mahamad Abbas* (3).

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RICHARDS, C. J., and KNOX and BANERJI, JJ. :—This appeal arises out of an application for execution of a decree. Originally there was a decree in a mortgage suit. The mortgaged property having all been sold and found insufficient to satisfy the debt, a decree under order XXXIV, rule 6, was granted on the 4th of March, 1911. An application was made for execution of this decree and on the 3rd of March, 1910 the court ordered that notice should go to the judgment-debtors. The application in execution was subsequently struck off. It appears that notice did go from the court, but nevertheless the application was struck off. On the 5th of March, 1917, the present application for execution was made. It was met with the objection on behalf of the judgment-debtors that it was barred by time. The notice which went from the court in consequence of the court's order, dated the 3rd of March, 1914, was dated the 4th of March. The 4th of March, 1917 was a Sunday. Accordingly, if the period of limitation is to be reckoned from the 4th of March, 1914, it is just within time; if, on the other hand, it is to be reckoned from the 3rd of March, 1914, it is just too late. The article which is applicable is article 182 (clause 6). That clause is as follows:—

“(Where the notice next hereinafter mentioned has been issued) the date of issue of notice to the person against whom execution is applied for to show cause why the decree should not be executed against him, when the issue of such a notice is required by the Code of Civil Procedure of 1908,”

Notice was required by the Code of Civil Procedure in the present case, because the decree was more than a year old. The question in the case is as to the meaning of the expression “date of issue of notice.” Under the previous Limitation Act the words were identical, except that instead of the expression “date of issue of notice” the expression is “date of issuing a notice.” Under the previous Act the practice had been uniform in this Court since the year 1881, that the “date of issuing a notice” meant the date of the order of the court directing that notice should

(1) (1905) I. L. R., 27 All., 704.

(2) (1904) I. L. R., 29 Bom., 68.

(3) (1912) I. L. R., 36 Bom., 498.

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go. The Bombay High Court seems to have followed a similar practice, whilst the High Courts of Madras and Calcutta have taken a different view. The expression "issuing of a notice" or "issue of notice" is somewhat ambiguous. What happens in the court is that an application is made for execution. The court orders that notice should go to the party against whom execution is sought. That notice is prepared in the office and is signed either by the Judge or some person whom he deposes to sign for him. In the present case the notice is signed by the Munsarim. After the notice is prepared and signed and sealed it is given to the Nazir, who in turn selects a peon, who is to serve it on the party to whom it is directed. It is extremely difficult to say when a notice of this kind can be said to have been "issued." The "issue" is certainly not complete when the court makes its order directing that notice is to go. It is still incomplete when it is prepared and signed by the Munsarim. In fact the "issuing" is not fully complete until it has actually left the hands of the Nazir and has been given into the hands of the peon (or process server). If this question which we have had discussed before us in the present case was *res integra* we would find it extremely difficult to say what was the date of the "issue" of the notice within the meaning of the article. The "issue" of a notice seems to be a proceeding which begins with the order of the court and ends with delivery of a notice to a process server for service. Possibly a convenient date might be the one which has been suggested in the course of the argument, namely, the date which the notice itself bears. We, however, think that we ought to adhere to the practice which has been in force for a very great number of years in these provinces, unless we come to the conclusion that there was a deliberate alteration in the present Limitation Act. What is required in the interest of justice is a settled rule and a date that is certain. The date of handing over to the peon for service would be a very inconvenient date. We find it impossible to see that there is any difference between the expression "date of issuing of a notice" and the expression "date of issue of notice." That being so, we think the established practice should prevail and that the order below was wrong.

A second point was mentioned in the course of the argument, namely, that some of the decree-holders are minors and that they are entitled to the benefit of section 7 of the Limitation Act. It appears in the present case that at the time the decree was made the decree-holders were all of full age, that also at the time of the application of 1914 the decree-holders were of full age, and that it was after the date on which the application was struck off that the minority ensued. Under these circumstances the decree-holders are not entitled to the benefit of section 7. See *Bhagat Bihari Lal v. Ram Nath* (1). We were referred to the Full Bench decision in L. L. R., 22 All., 199. In that case there had been an application on behalf of minor decree-holders which gave a fresh starting point, and accordingly the decree-holders were within the express provisions of section 7.

We allow the appeal, set aside the order of the court below and dismiss the application for execution with costs in both courts.

Appeal decreed.

APPELLATE OVTHI

Before Mr. Justice Tudball and Mr. Justice Abdul Raouf.

NARAIN DAS (PLAINTIFF) v. HET SINGH AND OTHERS (DEFENDANTS) *
Act No I of 1877 (Specific Relief Act), section 9—Suit for recovery of possession of immovable property—Construction of plaint—Suit framed as a suit on title, but also referring to section 9 of the Specific Relief Act—Practice.

In a suit for recovery of possession of immovable property, from which the plaintiff alleged that his sub-tenants had been ejected by the defendants, the plaintiff claimed (1) a declaration of his title to, and possession of, the land in suit, (2) damages for dispossession, and (3) costs. In the body of the plaint it was mentioned that the suit was under section 9 of the Specific Relief Act, 1877, and therefore the full court fees had not been paid.

At the hearing the plaint was amended by striking out the claim for a declaration of title; but the claim for damages was retained.

* Second Appeal No 1022 of 1916, from a decree of W. T. M. Wright, District Judge of Budaun, dated the 3rd of May, 1916, reversing a decree of Madan Mohan Seth, Munsif of Bisauli, dated the 18th of December, 1915.

(1) (1905) 1 L. R., 27 All., 704.

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Held, on a construction of the plaint, that the suit was in substance a suit for possession based on title, and should have been tried as such, notwithstanding the reference in the plaint to section 9 of the Specific Relief Act. *Nazir Ahmad v. Abid Ali* (1) referred to.

THE facts of this case are fully stated in the judgment of the Court

Mr. *M. L. Agarwala*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents.

TUDBALL and ABDUL RAOOF, JJ.:—This appeal arises out of a suit brought for possession of property and damages. The plaintiff in paragraph 1 of his plaint stated that Musammatt Gulabo, defendant No. 2, was the zamindar and owner of nine bighas and nineteen biswas of land in a certain village, that she and her husband, defendant No. 1, mortgaged the same with possession to the plaintiff for a period of five years under a registered mortgage-deed for Rs. 600 on certain conditions, one of which was that the principal mortgage-money should be deposited in the month of *Jeth* before the property could be redeemed. He went on to state that he, the plaintiff, obtained possession of the property and had it cultivated through his sub-tenants. In paragraph 2 of the plaint he stated that on the 1st of September, 1915, the two principal defendants mentioned above ejected his sub-tenants who were made *pro forma* defendants to the suit and without paying the mortgage-money unlawfully took possession of the property and that they were still in such possession; that they had refused to deliver possession to the plaintiff or to pay him his mortgage-money or to pay him the damages which he had suffered. He dated his cause of action as the 1st of September, 1915, the date of the trespass. In paragraph 3 of his plaint he merely stated that he had impleaded the sub-tenants as *pro forma* defendants. In paragraph 4 of the plaint he stated that the suit for the purposes of jurisdiction and payment of court fees was valued at Rs. 600, the mortgage-money, plus Rs. 114, the amount of damages, but with regard to the claim being under section 9 of the Specific Relief Act, the court fee had been paid on half the mortgage-money and the entire amount of damages, that the suit was within the local limits of the jurisdiction of the court.

hence the suit was cognizable by the court. The following reliefs were prayed for :—

“(1) That the plaintiff's rights may be declared the principal defendants dispossessed and the plaintiff as mortgagee may be put into possession of the 9 bighas, 19 biswas of land numbered as below, situate in mauza Bhursaya.

(2) That Rs. 114 due on account of damages for 1323 Fasli may be awarded to the plaintiff as against the principal defendants.

(3) The costs of the suit may be awarded.

(4) That any other relief to which the plaintiff may be entitled may also be granted.”

It will be noticed that it is only in paragraph 4 of the plaint that the plaintiff mentions section 9 of the Specific Relief Act and he only mentions it to show why he paid court fees on half the mortgage-money. In their defence the defendants urged that the claim was one based on title and therefore could not be brought under section 9 of the Specific Relief Act. They pointed out that the claim for damages along with that for possession could not be maintained under section 9 of the Specific Relief Act. They then went on to deny the allegations of fact and raised other points in defence. When the case came on for trial the learned vakil for the plaintiff amended the plaint by striking out in the first relief the words “The plaintiff's right may be declared,” and retaining the following words “the principal defendants may be dispossessed and the plaintiff, as a mortgagee, may be put in possession of the 9 bighas and 19 biswas *pukhta* of land.” The claim for damages was allowed to remain. The learned Munsif thereupon treated the suit as a suit under section 9 of the Specific Relief Act, held that the suit was not barred by limitation; held that no claim for damages could be joined with the suit claiming possession under section 9 of the Specific Relief Act; dismissed the claim as to damages and gave the plaintiff a decree under section 9 for possession of the property without going into the merits of the other defences at all. The defendants appealed to the District Judge. Objection was there taken that no appeal could lie in a suit brought under section 9 of the Specific Relief Act. The Judge treated the suit

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as a suit based on title. He held it to be of that nature, but instead of remanding it to the court of first instance for decision on the merits, he held that, in view of the decision of this Court in *Nazir Ahmad v. Abid Ali* (1), he was bound to dismiss the suit *in toto*. He accordingly dismissed it. There are two pleas raised before us in the alternative. The first is that the suit being a suit under section 9 of the Specific Relief Act, no appeal lay to the court below. The second is that if it was not such a suit, then the first court ought to have remanded it to the court of first instance for decision on the merits. The facts are as stated above. The first question before us is whether or not the suit as it stands is really a suit based on title or is one under section 9 of the Specific Relief Act. As pointed out above, the only mention of section 9 of the Specific Relief Act is to be found in paragraph 4 of the plaint and it was mentioned more as an excuse or an explanation of the amount of court fees paid on the plaint. Even after the amendment made, that is, after the striking out of the words "the plaintiff's right may be declared," it seems to us that the suit is clearly a suit based upon title and that in so holding the court below was correct. There remains the point as to whether the lower appellate court was justified by the ruling quoted above in dismissing the suit *in toto*. We do not think that that ruling is any authority for the decision at which the lower appellate court has arrived. In that case really what this Court decided was that the suit as brought was a suit based on title in which an appeal did lie to the lower appellate court and that the lower appellate court had rightly dismissed the suit on the merits. In the present case, the suit being really a suit based upon title, the Munsif wrongly dealt with it as a suit under section 9 of the Specific Relief Act. The case ought to have been sent back to that court to be dealt with as a suit based upon title, to have the proper issue framed and to be decided on the merits. We therefore allow this appeal. We set aside the decree of the court below, and we direct that the record be sent back through the lower appellate court to the court of the learned Munsif, to be restored to its number upon the file and to be heard and decided, according to law.

The costs of this appeal will be costs in the cause and will abide the result.

Appeal allowed, cause remanded.

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REVISIONAL CRIMINAL.

Befo e Justice Sir Pramadla Chaman Banerji.

EMPEROR v SHEO SAMPAT PANDE *

Criminal Procedure Code, section 4—Act No. XLV of 1860 (Indian Penal Code), sections 193, 210—Sanction to prosecute—Complaint—Letter from trying Magistrate to his official superiors for asking merely for directions as to procedure

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May, 22.

The holder of a decree for rent, passed by an Assistant Collector of the second class, took out execution for a larger sum than was in fact due and also gave in his application a wrong date as the date of the decree. The judgment-debtor paid the amount claimed under compulsion, and thereafter applied for sanction to prosecute the decree-holder. Upon receipt of this application the Assistant Collector wrote a letter to the District Magistrate, forwarding it through his immediate superior the Sub-divisional Magistrate, in which he stated all the facts of the case and concluded by soliciting orders in the case. The Sub-divisional Magistrate, instead of forwarding this letter to the District Magistrate, himself passed orders for the prosecution of the decree-holder. He tried the case himself and convicted the decree-holder of offences under sections 193 and 210 of the Indian Penal Code. On appeal the conviction and sentence were upheld by the Sessions Judge.

Held that the letter written by the Assistant Collector to the District Magistrate, in which the former did not ask that any action should be taken by the Magistrate, but merely for directions as to how he should proceed did not amount to a "complaint" within the meaning of section 4 of the Criminal Procedure Code, and, there being no complaint, the trial was illegal.

THE facts of the case are fully set forth in the judgment. For the purposes of this report they may be briefly stated as follows:—

Sheo Sampat filed a suit in the court of a tahsildar to recover arrears of rent and obtained a decree for a smaller sum than that claimed. In his application for execution of the decree the sum which had been claimed by him was put down as the decretal amount, and the date of the decree was also given wrongly. The full amount was realized from the judgment-debtor and paid to the decree-holder, Sheo Sampat. Then the judgment debtor applied to the court for sanction to prosecute

*Criminal Revision No 110 of 1918, from an order of W. R. G. Moir, Sessions Judge of Gorakhpur, dated the 23rd of January, 1918.

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Sheo Sampat for false verification of the application for execution. Sheo Sampat filed an application stating that he had made a *bona fide* mistake. The tahsildar did not grant sanction, nor did he take action under section 476 of the Code of Criminal Procedure, but he addressed a letter to the District Magistrate, through the Sub-divisional Office, setting forth the facts and concluding as follows:—"The above facts are borne out by the record herewith submitted. I beg to solicit orders in the case." The Sub-divisional Officer, without forwarding the letter to the District Magistrate, himself took action and issued process to Sheo Sampat to answer charges under sections 193 and 210 of the Indian Penal Code. He tried the case himself and convicted and sentenced Sheo Sampat to two years' rigorous imprisonment and a fine. On appeal, the Sessions Judge upheld the conviction and sentence. Sheo Sampat applied in revision to the High Court.

Babu *Piari Lal Binsrji* (with him Pandit *Narbadeshwar Prasad Upadhyaya*), for the applicant:—

The offences with which the accused was charged are among those mentioned in section 195 of the Code of Criminal Procedure, consequently, no court could take cognizance of them except with the sanction, or on the complaint, of the court concerned. The Tahsildar did not grant sanction; his letter cannot, by any stretch of the imagination, be deemed as granting sanction. The letter is not an order under section 476 of the Code of Criminal Procedure, nor is it a complaint, as defined by section 4 of the Code of Criminal Procedure, as it is not an allegation made to a Magistrate with a view to his taking action under the Code. The Tahsildar merely wrote to his official superior and consulted him in the matter. He asked for directions as to how he was to proceed. He did not ask the District Magistrate to take steps under the Code against Sheo Sampat. I am supported by the case of *Ahmed Husain v. Emperor* (1). The case of *Emperor v. Sundar Samup* (2) is distinguishable. There the Assistant Collector submitted the record to the Collector and Magistrate of the district

there was only a negligent mistake, and that no offence under section 193 of the Indian Penal Code was committed. The case of *Emperor v Muhammad Ishaq* (1) is in my favour.

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The Assistant Government Advocate (Mr. R. Malcomson) for the Crown :—

The letter of the Tahsildar was intended to be a complaint, and was treated by the Sub-divisional Officer as such. There is no prescribed form for a "complaint," nor is an express prayer to take action essential. The irregularity, if any, would be cured by section 537 of the Code of Criminal Procedure. It has not been shown that a failure of justice has been occasioned by such irregularity. On the merits, both the courts below have found as a fact that there was no *bond fide* mistake, but a deliberate intention to try and realize more from the judgment-debtor than was legally due.

BANERJI, J :—The applicant, Sheo Sampat, who is an old man of seventy, has been convicted under section 193 and section 210 of the Indian Penal Code, under the following circumstances :—Sheo Sampat brought a suit in the Revenue Court against one Barbu for arrears of rent. He claimed Rs. 16-11-0 as principal and interest. An *ex parte* decree was passed in his favour on the 29th of September, 1916 for Rs. 9-4-0 and Rs. 2-5-0 costs, total Rs. 11-9-0. The judgment-debtor, Barbu, made an application to have the *ex parte* decree set aside. This application was granted. The case was re-heard and on the 24th of May, 1917 a decree was made for Rs. 8-3-0, which included costs. On the 19th of May, 1917, Sheo Sampat filed an application for execution of the decree. In that application the date of the decree was erroneously mentioned as the 20th of June, 1917, and the amount claimed was put down as Rs. 16-11-0. He took out attachment of some property of the judgment-debtor. Meanwhile the judgment-debtor deposited the full amount of the decree. In pursuance of the order of attachment of the property of the judgment-debtor some bullocks were attached by the Amin. The judgment-debtor paid the Amin Rs. 17-5-6 which was the amount mentioned in the warrant of attachment, and this amount was received by Sheo Sampat, who granted to the judgment-debtor

(1) (1914) I. L. R., 36 All., 362.

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a receipt in full for the aforesaid sum of Rs. 17-5-6. Subsequently he filed an application in the court which was executing the decree, stating that he had made a mistake and that the amount due to him was only Rs. 8-3-0 and no more. Three days before the date of that application the judgment-debtor had applied to the court to sanction the prosecution of Sheo Sampat. No sanction was granted. The Assistant Collector of the second class, who was the tahsildar in whose court the execution proceedings were held, did not take action under section 476 of the Code of Criminal Procedure, but on the 6th of October, 1917 he addressed to the Magistrate of the district a letter in which he stated all the facts and concluded by soliciting orders in the case. This letter was intended to be submitted to the District Magistrate through the Sub-divisional Officer, Mr. Gurney. Mr. Gurney, instead of sending the application to the District Magistrate, himself ordered the prosecution of Sheo Sampat and issued process against him. He himself tried the case and convicted Sheo Sampat and sentenced him to two years' rigorous imprisonment and a fine. This conviction was upheld by the lower appellate court.

The first contention in revision is that the trial was without sanction and was therefore illegal. The offences of which the applicant Sheo Sampat has been convicted are offences referred to in section 195 of the Code of Criminal Procedure. Therefore it was absolutely necessary either that sanction for the prosecution was granted or that a complaint was made by the officer before whom the offence was committed, or some officer to whom he was subordinate. As I have already stated, no sanction was granted and as no proceedings were taken under section 476, it cannot be said that a complaint was made under that section. There remains, therefore, the question whether the letter of the 6th of October, 1917, addressed to the Magistrate of the district, amounted to a complaint within the meaning of that expression as defined in the Code of Criminal Procedure. I find it very difficult to hold that it was a complaint. All that the tahsildar did was to state the facts of the case. He did not ask that any action should be taken by the Magistrate, nor did he intend that the Magistrate should proceed

according to law against Sheo Sampat. The only thing stated in the letter after stating the facts was "I beg to solicit orders." From this it may be inferred that he asked the Magistrate of the district, who also happened to be the Collector to whom the tahsildar was subordinate, to instruct him as to what action he should take in the matter. It would be stretching the meaning of the expression "complaint" to hold that the tahsildar by writing this letter made a complaint and intended the letter to be treated as a complaint against Sheo Sampat with a view to the Magistrate taking action. If that had been the intention he would not have solicited orders which apparently meant orders to him to take some action in the matter. Under these circumstances I am unable to agree with the learned Sessions Judge that there was a complaint by the tahsildar in this case, and that consequently the Magistrate who tried the case could take cognizance of it. In my opinion, as there was no complaint, the trial was illegal and the conviction must be set aside.

I have also considered the merits of the case. I am unable to hold that the accused Sheo Sampat intentionally made a false statement in his application for execution. The statement contained in that application was no doubt false, but I am not satisfied that he knew that the statement was false, or believed that it was untrue, and that he made the untrue statement intentionally. In this view the conviction of Sheo Sampat cannot be maintained.

I allow the application, set aside the conviction and sentence and direct that the fine, if paid, be refunded. The applicant need not surrender to his bail. The bail bond is discharged.

Order set aside.

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REVISIONAL CIVIL.

1918
May, 27.

Before M. L. JASWAL, P. J., C. J.

MANSUKH RAM AND OTHERS (DEFENDANTS) v. HARJRAJ SARAN SINGH
(PLAINTIFF).*

Civil and Revenue Courts—Judicial Suit by zamindar for damages in respect of the felling of trees on agricultural land by tenants—Act (Local) No. II of 1901 (Agra Tenancy Act), section 167, cl. 167.

Held that a suit for damages for the alleged wrongful felling by the tenant of trees on an agricultural holding is not a suit which is excluded from the jurisdiction of a civil court. *Lachman Das v. Mohan Singh* (1) referred to.

THE facts of this case were as follows :—

The defendants were tenants with a right of occupancy of two plots of agricultural land, the property of the plaintiff. Somewhere on these plots stood two trees which were the property of the plaintiff. The defendants cut down these trees and appropriated the timber to their own use. The plaintiff zamindar thereupon sued the defendants in the court of a Munsif having small cause court jurisdiction for damages in respect of the felling and appropriation of the trees, and obtained a decree for Rs. 15. The defendants applied in revision to the High Court upon the ground that the Munsif had no jurisdiction in the case.

Munshi *Harbans Sahai*, for the applicants.

Mr. *M. L. Agarwala*, for the opposite party.

PIGGOTT, J.:—The applicants in this case are certain defendants against whom a decree for Rs. 15 as damages has been passed in favour of the plaintiff by the learned Munsif of Meerut in the exercise of his jurisdiction as Judge of a Court of Small Causes. The question raised by this application is whether the cognizance of the court below was or was not barred by the provisions of section 167 of the United Provinces Tenancy Act, Local Act No II of 1901. Putting aside certain matters of detail no longer in controversy, the essential facts may be stated thus:—The defendants were tenants with a right of occupancy of two plots of agricultural land, the property of the plaintiff. Somewhere within the boundaries of this agricultural holding there stood two trees

Civil Revision No. 229 of 1917.

(1) (1912) 9 A. L. J., 672.

which were not the property of the defendants but of the plaintiff. The defendants cut down those trees and appropriated the timber thereof to their own use. It scarcely requires to be pointed out that, apart from any provision of the Local Tenancy Act, restricting the jurisdiction of the Civil Courts in such a matter, the plaintiff's claim for damages on account of this tortious act was clearly cognizable by a Court of Small Causes and, on the facts found, the decree in favour of the plaintiff is a proper one. The only question therefore is whether the suit is barred by the provisions of section 167 aforesaid. This again depends upon the interpretation to be put upon certain provisions of sections 57 and 65 of the same Act. The latter of these sections merely says that, if a tenant is found liable to ejectment from his holding on any of the grounds specified in clause (b) or clause (c) of section 57, the Revenue Courts have jurisdiction to give the landholder a decree for compensation in lieu of, or in addition to, the ejectment of the tenant. The question therefore is whether, on the facts alleged in the plaint, the defendants were liable to ejectment under the provisions of section 57 aforesaid. I am unable to hold that the cutting down of the two trees under the circumstances alleged was an act detrimental to the land. There is certainly no presumption to that effect; on the contrary, in so far as the land is used for cultivating purposes, the removal of these two trees would presumably be calculated to increase its productivity. The only question therefore is whether the act of the defendants in cutting down these trees could have been proved by the plaintiff, in a proceeding in the Revenue Courts, to have been an act inconsistent with the purpose for which the land was let to the defendants. There is no allegation to this effect in the plaint; and I am bound to say that in my opinion the plaintiff would have had considerable difficulty in satisfying a Revenue Court that this land had originally been let to the defendants under such circumstances as would make the cutting down of these trees an act inconsistent with the purpose for which the lease was given. If any landholder under similar circumstances feels himself able to establish such a plea by evidence, I would by no means debar him from seeking the protection of the Revenue Courts, but in the present case I find no reason for holding that

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the plaintiff was in any way debarred from claiming damages in a Civil Court, on the simple allegation that the defendants had taken advantage of their position as tenants of the land in order to cut down and appropriate to themselves two trees which were the property of the plaintiff. I have been referred in argument to a number of rulings supposed to have some bearing upon the question in dispute; but I do not think it necessary to discuss them here. Most of them seem to me to have no bearing upon the particular point to be decided in this case. The only one about which I should not be prepared to say this is the decision of a single Judge of this Court in *Lachman Das v. Mohan Singh* (1). That decision, so far as the question of jurisdiction is concerned, is entirely against the defendants. I take the liberty of saying with all respect to the learned Judge of this Court who decided that case, that he has gone somewhat further in the way of affirming the jurisdiction of the Civil Court to deal with matters of this sort than I should myself be prepared to do, at any rate without further argument; but as regards the case now before me I find no good reason for holding that the plaintiff could have obtained appropriate relief for the loss which he has suffered by way of any suit or application brought or made before a Revenue Court. The jurisdiction of the learned Judge of the Court of Small Causes was therefore not barred and I dismiss this application with costs.

Application dismissed.

APPELLATE CIVIL.

1918
May, 30.

Before Justices Sir Pramada Charan Banerji and Mr Justice Ryves.

GOSWAMI GORDHAN LALJI AND OTHERS (JUDGMENT-DEBTORS) v.

GOSWAMI MAKSUDAN BALLABH (DECREE-HOLDER).*

Civil Procedure Code (1908), order XXI, rule 32—Execution of decree—Decree declaring rights of certain parties and forbidding interference therewith by other parties to suit—Mode of enforcing such decrees.

A decree was passed declaring the rights of certain parties to the suit to conduct certain religious ceremonies and enjoining on certain other parties to

the suit to refrain from interfering with the celebration of the said ceremonies by the parties in whose favour the decree was passed.

Held that it was not competent to the court passing such decree to secure obedience thereto by directing the Superintendent of Police to see that the ceremonies were carried out and to prevent interference therewith, nor was it competent to the court to appoint a commissioner to see that the terms of the decree were given effect to.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Shiam Krishna Dar*, for the appellants.

The Hon'ble Munshi *Narayan Prasad Ashtana*, for the respondent.

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BANERJI and RYVES, JJ.:—This appeal arises out of an application for the execution of a decree passed on the 17th of December, 1906, in a suit brought by one Goswami Manohar Lal against a number of defendants, of whom the appellant, Piari Lal, is one. Certain persons who were alleged to have the same rights as the plaintiffs were made defendants of the third party, one of these defendants being the present applicant for execution, Goswami Maksudan Ballabh. A decree was made by the court against all the defendants of the first and the second party, with the exception of one Kishori Lal, declaring that the plaintiff and the defendants of the third party were entitled to perform the "*Singar Arti*" ceremony in a certain temple both on ordinary and festive occasions. The decree also ordered a perpetual injunction to issue restraining the defendants of the first and second parties from obstructing the plaintiff and the defendants third party from performing the duties of the office claimed by them. The present application was made by Goswami Maksudan Ballabh, who is one of the defendants of the third party against Goswami Gobardhan Lalji, the grandson of Prem Lal, who was defendant No. 1, and Goshain Girdhar Lalji and Goshain Gordhan Lalji, the sons of Goshain Munna Lal, who was one of the defendants of the second party and Piari Lalji who, as we have said above, was also a defendant of the second party. It is stated on behalf of the decree-holder that these defendants are now interfering with the performance of the duties appertaining to the office which was claimed in the suit and which was decreed to the plaintiff and defendants of the third

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party. Their prayer, as contained in the application, is that the decree may be enforced through the Superintendent of Police of Muttra in this way that on the dates mentioned in the application he (the Superintendent of Police) may have the "Arti" performed by the decree-holder, applicant, and that the defendants may be directed not to interfere with the performance of those duties. The application was opposed on several grounds, but the objections were disallowed and the application as made was granted by the court below. In this appeal, which has been preferred by the judgment-debtors, the first contention raised is that Goswami Maksudan Ballabh is not entitled to apply for execution as he was not one of the plaintiffs to the suit. This objection was raised in the court below and was, we think, rightly disallowed. The decree was made in favour not only of Manohar Lal but also of the defendants of the third party declaring their right to perform the duties of the office claimed by them at certain hours every day and also on festive occasions. The decree thus declared the right of, amongst others, the present applicant Maksudan Ballabh and the injunction decreed was also an injunction in his favour. He is, therefore, entitled to maintain the present application.

The next contention put forward on behalf of the appellants is that the decree was personal to the persons in whose favour it was made and could only be enforced against the individuals who were defendants to the suit and not against persons who are their legal representatives. This contention also is in our opinion without force. It appears that the suit was brought on the basis of a right which the plaintiffs claimed as descendants of one of the founders of the temple and that the defendants were also made parties as such descendants. The plaintiffs claimed to have the right to perform certain offices which the defendants contended they themselves had a right to perform. So that the decree related to a hereditary office which the plaintiffs claimed and in regard to which their claim was resisted by the defendants. The injunction was also granted against them, not as individuals, but as persons who claimed a right as descendants of the original founder of the temple. The appellants, who, after the death of some of the defendants in the former suit, have taken their

place—or claim to have taken their place—are thus persons against whom the decree may properly be executed so far as the injunction goes. We may mention that this plea was not put forward in the court below and it therefore did not become necessary for that court to consider it.

The third contention is that the application is time-barred. As the decree was one for a perpetual injunction, limitation would run from the date of breach of the injunction, that is, from the date on which the defendants disobeyed the injunction. That date was within three years of the present application. Consequently no question of limitation arises in the present case, as held by the court below.

It is lastly urged that the court below was wrong in ordering the Superintendent of Police of Muttra to see that the ‘*Arti*’ was performed by Goswami Maksudan Ballabh and that the defendants offered no obstruction. So far as this part of the prayer in the application for execution is concerned we do not think that the court below ought to have granted it. It had no power under the Code of Civil Procedure to order the police to interfere in the matter. There being a decree for a perpetual injunction against the defendants or those whom they represent, it was the duty of the defendants to carry out the injunction, that is to say, to refrain from offering any obstruction to the performance of the office which was decreed to the decree-holder. If they disobeyed the order of the court they were liable to the penalties mentioned in order XXI, rule 32, of the Code, but the court could not order the police to see that the decree-holders performed the duties of their office without interference on the part of the defendants. If a breach of the peace was apprehended, that was a matter for the Magistrate and the police and not for the Civil Court. We accordingly set aside that portion of the lower court’s order which directs the Superintendent of Police to order the Sub-Inspector of Bindrahan to have the applicant Maksudan Ballabh perform “*Singar Arti*” in the temple.

We are also of opinion that the court had no power to appoint a commissioner to see that the decree-holder performed without obstruction the duties appertaining to his office. This portion of the lower court’s order, which was passed on a subsequent date,

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should also be set aside. In our opinion clause (5) of rule 32 does not authorize the court to make these orders, and provides for a different state of things.

We accordingly vary the order of the court below by directing that an order do issue to the defendants appellants forbidding them to interfere with the performance of the duties of the decree-holder, namely, "*Singar Arti*" every day and on festive days in the temple of Radha Ballabhji. If the defendants appellants fail to obey the injunction it will be time for the decree-holder to make a proper application in the terms of order XXI, rule 32. We direct the parties to bear their own costs of this appeal.

Decree varied.

1918
June, 5.

Before Sir George Knox, Acting Chief Justice, and Justice Sir Pramada Chawan Banerji.

ANANDGIR (DEFENDANT) v SRI NIWAS (PLAINTIFF) *

Act (Local) No II of 1901 (Agra Tenancy Act), section 193—Order of remand—Appeal—Preliminary and final decrees

A suit was brought in a Court of Revenue for a declaration that the plaintiff was the proprietor of certain *muafi* land. The court of first instance dismissed the suit. The lower appellate court set aside that decree and allowed the appeal to the extent that it held the plaintiff entitled to be declared a rent-free grantee of so much of the land as was entered in his name. It then added that "the suit be remanded to the lower court for determination of the revenue payable by the plaintiff appellant." Held that the order being one of remand no second appeal lay to the High Court; and as there was no provision in the Tenancy Act about preliminary or final decrees, the order could not be appealed against as a preliminary decree.

THE plaintiff brought a suit in the court of an Assistant Collector first class, to be declared proprietor of certain *muafi* land under section 158 of the Tenancy Act. The main plea in defence was that the *muafi* had been resumed long ago, and that the plaintiff was only an occupancy tenant of the land. The Assistant Collector found against the plaintiff and dismissed his suit. On appeal the District Judge found that the plaintiff had become proprietor; the decree of the Assistant Collector was

* Second Appeal No 1544 of 1916, from a decree of H. C. Forbes, District Judge, Cawnpore, dated the 23rd August, 1916, modifying a decree of Gurdev Lal Baidya, Assistant Collector, first class, of Fatehpur, dated the 13th of March, 1916.

accordingly, set aside, the plaintiff was declared proprietor, and the suit was remanded to the first court for determination of the revenue payable by the plaintiff. Against this decision the defendant filed a second appeal to the High Court. The appeal came up for hearing before a single Judge, who referred it to a Bench of two Judges.

Mr. *N. C. Vaish*, for the respondent, took a preliminary objection that the appeal did not lie.

The District Judge has remanded the suit, and under the Tenancy Act no appeal is given from an order of remand. Section 182, which is the section which provides for a second appeal to the High Court, does so only from decrees. Section 193 excludes the application to suits under the Tenancy Act of the provisions of chapter XLIII of the Code of Civil Procedure of 1882, corresponding to order XLIII of the present Code. Order XLIII rule 1 (u) of the Code, which provides an appeal from an order of remand, has therefore no application to Rent Court suits. Hence, no appeal lies from the order of remand; *Vilayat Husen v. Maharaja Mahendra Chandra Nandy* (1), *Zahur Ali v. Sher Ali* (2) and *Gulzari Lal v. Latif Husain* (3). Unless an appeal is expressly provided for by the Tenancy Act it will not lie; nor will it be sustained upon any analogy furnished by the provisions of the Code of Civil Procedure; *Karunpal Singh v. Bhima Mal* (4) and *Kirpa Devi v. Rm Chandar Surup* (5).

Munshi *Haribans Sahai* (for Munshi *Nawal Kishore*), for the appellant (in reply to the preliminary objection).

The appeal is in form and substance an appeal from a decree and not an appeal from a mere order of remand. It is submitted that the decision of the District Judge amounts to a decree. It is to be remembered that the definitions of "decree" and "order" given in the Code of Civil Procedure have not been adopted by the Tenancy Act and do not apply to all cases under that Act; *Zohra v. Mangu Lal* (6). So, the notion derived from the Code of Civil Procedure that where an appellate court reverses the decision of the first court and remands the case the

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(1) (1905) I. L. R., 28 All., 88. (4) (1910) I. L. R., 32 All., 373.

(2) (1905) I. L. R., 28 All., 283. (5) (1918) I. L. R., 40 All., 219.

(3) (1916) I. L. R., 38 All., 181. (6) (1906) I. L. R., 28 All., 753.

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decision of the appellate court amounts merely to an "order" and not a "decree" has to be discarded in considering cases arising under the Tenancy Act. The Act itself furnishes no definition of what is and what is not a "decree" within the meaning of the Tenancy Act. The District Judge had decided all the material issues in the case, and the remand order related only to the assessment of revenue, as regards which there was no issue in the court of the first instance; nor was it a substantial issue between the parties. The order of remand related only to a matter which did not affect the real merits of the claim but was purely a matter of arithmetical calculation. The decision was a "decree" in substance. It amounted to a preliminary decree is not a final decree; and the remand order was for the purpose of determining the proportionate revenue and preparing the final decree. The Board of Revenue of the United Provinces has taken this view in the case of *Tikaram Singh v. Kunwar Sen* (1). The matter decided in this preliminary decree could not be questioned in appeal from the final decree; and if the present appeal be held incompetent then the appellant will have absolutely no remedy. Such a decision will lead to great hardship and failure of justice.

Mr. N. C. Varsh, in reply:—

The contention that in a case like the present the order of remand amounts to a decree so as to be appealable under section 182 is not sound. If it had been the intention of the Legislature to give certain orders passed under the Act the force of decrees so as to be appealable as such, it could have given a definition of "order" or of "decree" in the interpretation clause of the Act in furtherance of that intention. The Legislature has not done that; there is nothing to indicate that it ever intended to make any distinction between one class of orders and another, in this respect. There is no such thing as a preliminary decree under the Tenancy Act. The Act recognizes only one decree, namely, a final decree. A comparison of the language of section 177 of the Tenancy Act and sections 96, 97, and 100 of the Code of Civil Procedure, clearly shows the distinction between the

meanings attached to the term "decree" in the two Acts. The words used in section 177 of the Tenancy Act, are "the decree," which connote only one class of decree; while the words in sections 96, 97, and 100 of the Code are "every decree," which connote several classes of decrees. And further, there is a specific mention of the term "preliminary decree" in section 97, Civil Procedure Code. It is from the decrees passed in the suits included in the fourth schedule of the Tenancy Act that appeals are provided for and the only decree, mentioned in the fourth schedule, under section 158 is a decree "for the assessment to revenue of a rent-free grant." That is the only decree, therefore, from which an appeal can lie in a suit under section 158. Any order passed prior to such a decree cannot possibly amount to that decree and be appealable as such decree. To regard the decision of the District Judge as a preliminary decree and to hold it to be appealable would be inconsistent with the provisions of the Tenancy Act. As was held in *Zohra v. Mingu Lal* (1) a provision of the Code of Civil Procedure which would be inconsistent with the provisions of the Tenancy Act cannot be applied.

KNOX, A. C. J., and BANERJI, J.:—The plaintiff in the court of first instance is the respondent here. He brought a suit in the Revenue Court in which he prayed that he might be declared proprietor of a disputed *muafi* and that costs, etc., might be granted to him. The court of first instance dismissed his claim altogether. He then went in appeal to the District Judge of Cawnpore who ordered that the decree of the lower court, that is to say, the court of first instance, dated the 13th of March, 1916, be set aside and the appeal be allowed to the extent that the plaintiff was entitled to be declared rent-free grantee of so much of the land in suit as he was then entered in the revenue papers as occupancy tenant of the same. The order, however, did not stop here. It went on as follows:—"That the suit be remanded to the lower court for determination of the revenue payable by the plaintiff appellant." The defendant has now come to this Court and asks that the decree of the lower appellate court be set aside and the decree of the Assistant Collector be restored or any other order that may be deemed fit, may be passed. Various pleas were then set out attacking the judgment

(1) (1908) I. L. R., 28 All., 753.

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of the District Judge. Upon the appeal being called on in this Court for hearing a preliminary objection was at once raised on behalf of the plaintiff respondent, namely, that no second appeal lies from the order of the District Judge. In support of the contention stand was taken upon section 193 of the Agra Tenancy Act of 1901, and it was contended on the ground set out in clause (a) of section 193, that the provisions of the Code of Civil Procedure did not apply to the procedure in suits and other proceedings under the Rent Act. Our attention was called to the case of *Vilayat Husen v. Maharaja Mahendra Chandra Nandy* (1), and *Gulzari Lal v. Latif Husain* (2). The learned Vakil for the appellant meets this objection by maintaining that he is not appealing from any order, but from a decree, and so seeks to bring the case away from clause (a) of section 193. He dwelt a great deal upon the hardship that, if it was held otherwise, he would have no remedy. Be that as it may, we are here not to make law but to expound it as it stands and it appears to us that the only meaning we can put upon clause (a) of section 193 of the Rent Act is that no appeal lies from an order of this kind. He contended that the decision of the District Judge of Cawnpore was in reality a preliminary decree. We have considered this, but we are unable to agree with it. The Tenancy Act says nothing from first to last about preliminary or final decrees. The result is that the objection prevails and the appeal is dismissed with costs. There is a cross-objection but we have heard nothing about it from the beginning of the case up to this moment. It stands dismissed.

Appeal dismissed.

lease of a certain muafi village. He transferred to the lessees all rights of every kind, reserving only to himself an annual sum payable as rent with a right to re-enter in case of default of payment.

Held that in the circumstances the lessees must be regarded as "proprietors" within the meaning of section 150 of the Agra Tenancy Act, 1901, and were entitled to sue for resumption of the muafi.

THE facts of this case were as follows :—

The plaintiffs were persons to whom the Maharaja of Benares used to make a monthly cash payment as a grant of some sort or another. At their request to substitute for this payment a grant of land, the Maharaja gave them a perpetual lease of a muafi village. He transferred to them all rights of every kind, reserving only to himself an annual sum payable as rent with a right to re-enter in case of default of payment. On the strength of this *istimrari* lease, the plaintiff's lessees instituted a suit for resumption of the muafi. The court of first instance decreed the suit, and this decree was, on appeal, affirmed by the District Judge. The defendants appealed to the High Court.

Munshi *Gulzari Lal*, for the appellants.

Munshi *Gokul Prasad*, for the respondents.

TUDBALL and ABDUL RAOOF, JJ.—The second appeal arises out of a suit brought for the resumption of a muafi *khidmati*. It has been decreed by both the courts below. In the court of first instance a plea was taken that the plaintiffs had no right to sue for resumption. That plea was decided in favour of the plaintiffs. The defendants appealed to the District Judge, but that appeal did not again raise this point. In this second appeal this point has again been raised before us. For the decision thereof it is necessary to state a few facts. The zamindar of this village is His Highness the Maharaja of Benares. The plaintiffs are persons to whom a monthly payment in cash used to be made by His Highness as a grant of some sort or other. They approached him and asked him to substitute for his grant in cash a grant of land which they might hold and possess and if possible develop and improve. Accordingly the Maharaja gave to the plaintiffs a perpetual *istimrari* lease of the village in question. He transferred to them all rights of all sorts reserving only to himself an annual sum payable as rent with the right to re-enter in case of default of payment by the

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plaintiffs. In the body of the lease there is specific mention of the *muafi khidmati* and other classes of *muafi*. By the terms of the deed the plaintiffs were given full powers over this land. The plea taken on behalf of the defendants is that under the terms of section 150 of the Tenancy Act, the only person who can sue for resumption is the proprietor of a *mahal* or a portion of a *mahal*, that the proprietor is the Maharaja and the plaintiffs are not proprietors and therefore have no right to sue under this section. The reply on behalf of the plaintiffs is that the Maharaja's rights under section 150, as proprietor, having been transferred to the plaintiffs, such a transfer is not illegal or contrary to law, and as that proprietary right now vests in the plaintiffs, they, in the circumstances of the present case, must be held to be proprietors of the *muafi* for the purposes of section 150. There can be no doubt that the Legislature in section 150, used the word "proprietor" and not "land-holder" and it is highly probable that the Legislature intended that the right to resume should be only in the proprietor and nobody else. We may assume this for the purposes of our decision. The question is whether in the circumstances of the present case this part of the proprietary right is vested in the plaintiffs or not by the terms of the lease. As we have mentioned above, the lease is a perpetual one, and all that the Maharaja reserved to himself was the right to receive an annual payment from the plaintiffs together with the right to re-enter in case of default. He clearly transferred to them all the other rights which go to make up the bundle of rights which constitute proprietorship. We think, therefore, that in the circumstances of this case the plaintiffs, for the purposes of section 150, must be deemed to be the proprietors of the *mahal*. It must not be taken for granted that we hold that this would be the case in every instance of a lease granted by a proprietor. The rights of a lessee are defined by the terms of a lease, and in each case the court will have to look to the terms of the deed and see what rights were vested in the lessee. The only other point which is raised in the case has no force and requires no discussion. The decree of the court below is, in our opinion, correct. We dismiss this appeal with costs.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Ryves.

NUR-UD-DIN KHAN (JUDGMENT-DEBTOR) v. PRAN KISHAN CHAKRA-

VARTI AND ANOTHER (DECREE-HOLDERS).*

Civil Procedure Code (1908), order XLIII, rule 1—Appeal—Order returning memorandum of appeal to be presented to proper court.

No appeal lies against the order of an appellate court returning a memorandum of appeal to be presented to the proper court.

THE facts of this case were as follows :—

A suit was brought by the appellant for dissolution of partnership and for the taking of partnership accounts. The matter was referred to arbitration, and an award was made which was accepted by the court and in accordance with which a decree was passed. Under the award the defendants were found entitled to Rs. 6,000 and odd from the plaintiff, and the award directed that they should realize the said amount by sale of the partnership assets. The defendants, who are respondents here, made an application to the court for execution of the decree, which has become final. The application was resisted on the ground that under the terms of the decree the applicants for execution were not entitled to take out execution. This objection was overruled by the court of first instance, and the appellant subsequently paid the amount of the decree, and, under the terms of the award, he obtained possession of the property, namely, partnership buildings and stock-in-trade, etc. The plaintiff preferred an appeal to the District Judge. The District Judge held that the decree was capable of execution, but he was of opinion that no appeal lay to him, and he directed the memorandum of appeal to be returned to the appellant for presentation to the proper court. In his opinion the value of the suit exceeded Rs. 5,000. From this order returning the memorandum of appeal judgment-debtor appealed to the High Court.

Dr. S. M. Sulaiman, for the appellant.

Babu Piari Lal Banerji, for the respondents.

BANERJI and RYVES, JJ. :—This appeal has been preferred under the following circumstances:—A suit was brought by the appellant for dissolution of partnership and for the taking of partnership accounts. The matter was referred to arbitration

* First Appeal No. 11 of 1918, from a decree of Austin Kendall, District Judge of Cawnpore, dated the 9th of June, 1917.

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and an award was made which was accepted by the court and in accordance with which a decree was passed. Under the award the defendants were found entitled to Rs. 6,000 and odd from the plaintiff, and the award directed that they should realize the said amount by sale of the partnership assets. The defendants, who are respondents here, made an application to the court for execution of the decree which, we may mention, has become final. The application was resisted on the ground that, under the terms of the decree, the applicants for execution were not entitled to take out execution. This objection was overruled by the court of first instance, and the appellant subsequently paid the amount of the decree, and, under the terms of the award, he obtained possession of the property, namely, partnership buildings and the stock-in-trade, etc. The plaintiff preferred an appeal to the District Judge. The District Judge held that the decree was capable of execution, but he was of opinion that no appeal lay to him, and he directed the memorandum of appeal to be returned to the appellant for presentation to the proper court. In his opinion the value of the suit exceeded Rs. 5,000. From this order returning the memorandum of appeal the present appeal was preferred. In the alternative it was prayed that the petition of appeal might be treated as an application for revision, if no appeal lay. In our opinion no appeal could be preferred to this Court from the order directing the memorandum of appeal to be returned for presentation to the proper court. Under order XLIII, rule 1, an appeal lies from an order returning a "plaint," but a "memorandum of appeal" is not a "plaint," and therefore that order has no application to the present case. This may be an omission on the part of the Legislature, but under the law as it stands we are unable to hold that the word "plaint" includes "the memorandum of appeal." This Court in the case of *Nazar Husain v. Kesari Mal* (1) held that no appeal lay from an order returning a memorandum of appeal. We see no reason to differ from the view taken in that case. We accordingly hold that this appeal as an appeal is not maintainable. Looking at the case as an application for revision we are of opinion that there are no merits in it, inasmuch as the decree made by the court awards to the defendants the amount

which they sought to recover by execution and which has been paid to them by the applicant. Whether that decree is a right decree or a wrong decree it is now too late to consider. A court executing a decree is bound to give effect to it as it stands and the decree in this case does award the amount claimed to the defendants. Therefore the case is without merit and we see no reason to exercise our discretionary powers under the revisional section of the Code of Civil Procedure. We accordingly dismiss the appeal, and decline to take action in revision. The respondents will get their costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR v. KEDAR NATH*

Act (Local) No. VI of 1912 (United Provinces Prevention of Adulteration Act), sections 4, 6—Commission agent exposing adulterated article of food for sale.

Held that a commission agent who exposed for sale (but did not sell) adulterated *ghr* was liable to punishment under section 4 of the United Provinces Prevention of Adulteration Act, 1912, and could not claim the benefit of section 6 of the Act.

THE facts of this case were as follows:—

One Kedar Nath, a commission agent doing business in Agra, had a quantity of canisters of *ghr* sent to him for sale. He apparently had not sold any of the *ghr*, but it was exposed for sale at his place of business. On samples being taken by the Chief Sanitary Inspector of Agra and submitted to the public analyst in accordance with the procedure prescribed by the United Provinces Prevention of Adulteration Act, 1912, the *ghr* was found to be adulterated, and a prosecution was started against the commission agent. In the result Kedar Nath was convicted of an offence under section 4 of the Act and fined Rs. 80. Against this conviction and sentence Kedar Nath applied in revision to the High Court.

Pandit *Shyam Krishna Dar*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

* Criminal Revision No. 262 of 1915, from an order of D. R. Lyle, Sessions Judge of Agra.

(2) (1903) I. L. R., 31 Cal., 844.

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TUDBALL, J.—The applicant has been convicted under section 4 of Act VI of 1912, which is a Local Act of the United Provinces Legislative Council. He has been sentenced to a fine of Rs 80. The facts of the case are not in dispute. The applicant is a commission agent, and as such he exposed for sale what purported to be *ghi*. The *ghi* no doubt belonged to those persons who had sent it to him for sale; but it was he who exposed it for sale, and he exposed it as being good and genuine *ghi*. The Chief Sanitary Inspector of the Agra Municipal Board went to his warehouse, where he saw certain canisters of *ghi* open and exposed for sale. There were a large number of other canisters unopened. With the consent of Kedar Nath he took several samples of *ghi*, gave one to Kedar Nath, kept one himself, and sent one to the public analyst. The certificates of the latter person show clearly that the *ghi* had been adulterated. The complaint in the present prosecution was signed by the Executive Officer of the Municipal Board on the 8th of October, 1917. This officer, on the 20th of September, 1917, was authorized by the Municipal Board to institute prosecutions under the Act. The samples obtained from the applicant were obtained on the 12th of September. Three points have been taken before me, one is that the prosecution is illegal in the present instance as it has not been made with the order or consent in writing of the proper person and also, that on the 12th of September, the Executive Officer had no power to institute the prosecution. The second point is that section 6 applies to the case and exonerates the applicant. The third point is that the applicant has acted in good faith. He sold what he had received from others and a smaller fine would be sufficient to meet the ends of justice. As regards the first point there is no force in it. On the date on which the complaint was made the Executive Officer had full power and the court was therefore fully justified in acting upon the complaint. As regards section 6, it clearly does not apply to the present applicant. Admittedly clause (a) of that section could not possibly apply to him as he is only a commission agent and had never purchased the *ghi* in question. Moreover, in the present case he has made no sale at all but had only exposed for sale. The Act may be defective, but that is not the fault of anybody else but the Legislative body.

Section 6 clearly does not apply to the present case. So far as the sentence is concerned, there can be very little doubt that the applicant as well as everybody else concerned knew that the *ghi* was adulterated. The Act was passed for the public welfare and it is only by a thorough working of it that the public will benefit from it. These persons who sell *ghi* are generally well aware of the fact that it is adulterated. I therefore see no reason to interfere with the sentence. The application is accordingly dismissed.

Application dismissed.

VISIONAL CIVIL.

Before Mr. Justice Abdul Raof.

BALDEO (DEFENDANT) v. PANNA LAL (PLAINTIFF).*

Act No. IX of 1887 (Provincial Small Cause Courts Act), schedule II, article 13—Small Cause Court—Jurisdiction—Suit by zamindar to recover a haqq, cess or due from tenant.

Held that a suit by a zamindar to recover from one of his tenants dues payable in kind under the provisions of the village *wajib-ul-arz* was excluded from the jurisdiction of a Court of Small Causes by article (13) of the second schedule to the Provincial Small Cause Courts Act, 1887.

THE plaintiff in this case sued as zamindar of the village of Maholi Shamsherganj, pargana Bhogaon in the district of Mainpuri, to recover from the defendant, who was a Teli living in the village, the price of a certain quantity of oil, which, the plaintiff asserted, the defendant was bound to deliver to him at the rate of two chataks daily according to a custom recorded in the village *wajib-ul-arz*.

The suit was instituted in a Court of Small Causes, and was decreed *ex parte*. The defendant came in revision to the High Court, upon the ground that in view of article (13) of the second schedule to the Small Cause Courts Act, 1887, the suit was not cognizable by a Court of Small Causes.

Munshi Baleshwari Prasad, for the applicant.

Munshi Girdhari Lal Agarwala, for the opposite party.

ABDUL RAOOF, J.:—Bohra Panna Lal the plaintiff in this case brought this suit against Baldeo, Teli, upon the following

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* Civil Revision, No. 28 of 1918.

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allegations:—In paragraph 1 of the plaint he stated that the plaintiff was a zamindar, co-sharer, and also a lambardar in mauza Maholi Shamsherganj, tahsil Bhogaon, district Mainpuri. In paragraph 2 of the plaint he stated that in accordance with the condition and custom entered in the *wajib-ul-arz*, the defendant was liable to give and deliver to the plaintiff two chataks of oil daily, that is to say, $3\frac{1}{2}$ seers every month. In paragraph 3 he stated that the defendant had not complied with the condition in the *wajib-ul-arz* for the period therein stated and he therefore claimed Rs. 49-8-0 as the price of the oil which had not been delivered to him by the defendant. The suit was filed on the 6th of August, 1917. In support of his claim the plaintiff filed a copy of an extract from the *wajib-ul-arz* in which the custom relied upon was entered. The *wajib-ul-arz* is dated the 10th of September, 1872, and its chapter IV, clause 6, is described in these words:—“*Fasil chaharam, daja shasham. Ragum jo malikan ko sukinae ghair mazare se leni jayiz hai.*” Below this the entry is made in these words:—“*Teliyan se tel muaftq jalane rozmarra chaupal aur dewali men ba wazan ek ser.*” The suit was brought on the basis of this entry in the *wajib-ul-arz* and it was decreed *ex parte*. The present application for revision has been filed against the decree and judgment of the court below. The ground taken before me is that the suit was not cognizable by a Court of Small Causes, and reliance is placed upon article (13) of schedule II attached to the Provincial Small Cause Court Act. The article runs thus:—“A suit to enforce payment of the allowance or fees respectively called *malikan*, and *hagq* or of cesses or other dues when the cesses or dues are payable to a person by reason of his interest in immovable property or in an hereditary office or in a shrine or other religious institution.” The present suit is certainly for dues which are claimed by the plaintiff as payable to him by reason of his interest in immovable property. The plea taken in revision is a valid plea and I think it was clearly contemplated to exclude such a suit from the cognizance of a Court of Small Causes. I hold that the court below had no jurisdiction to entertain this suit. I allow the application, set aside the judgment and decree passed by the court below and under order VII, rule 10 of the Code of Civil Procedure, I direct that the plaint be

returned to the plaintiff to be presented to the court in which the suit should have been instituted. The applicant will be entitled to his costs, and I order accordingly.

Application allowed.

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APPELLATE CIVIL.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Piggott.
LACHMI NARAIN DUBE (APPLICANT). v KISHAN LAL AND ANOTHER
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Act No. III of 1907 (Provincial Insolvency Act), sections 6, 15, 16—Insolvency—Petitioner examined and evidence taken—Case adjourned—Petitioner absent on adjourned date—Petition dismissed for want of prosecution.

When a petition for a declaration of insolvency has once been presented conformably to the requirements of Act No. III of 1907, the Court is bound, after completing the necessary inquiries, to come to a decision in respect of the various matters spoken of in section 15 of the Act and either to dismiss the petition under the provisions of that section, or to make an order of adjudication. But it cannot dismiss the petition merely because, on an adjourned date, the petitioner does not appear.

ONE Lachmi Narain Dube applied, under the provisions of Act No. III of 1907, to the Subordinate Judge of Mirzapur to be adjudicated an insolvent. The application was opposed by a creditor. The court examined the applicant and took certain evidence offered by the opposing creditor. The hearing was then adjourned, and continued, for various reasons, to be adjourned over a number of successive dates. Finally, on the 31st October, 1917, the case being called on, the applicant was found to be absent. The court there upon passed the following order:—
“Applicant is absent. The application is dismissed for want of prosecution.” The applicant appealed to the High Court against this order.

Muushi Harnan/lin *Prasid*, for the appellant.

The respondents were not represented.

BAVERJI and PIGGOTT, JJ :—This is an appeal by one Lachmi Narain Dube, who had applied to the court of the Subordinate Judge exercising jurisdiction in the district of Mirzapur to be adjudicated an insolvent. The application was opposed by a

* First Appeal No. 18 of 1918, from an order of F. B. Munda, Subordinate Judge of Mirzapur, dated the 31st of October, 1917.

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creditor; the court had examined the applicant and had taken certain evidence offered by the objecting creditor. The hearing was then adjourned for reasons which need not be discussed, and it continued to be adjourned over a number of successive dates fixed for the hearing. Finally on the 31st of October 1917, the case being called on, it was found that the applicant did not appear. The court, thereupon, passed the following order:—

"Applicant is absent. The application is dismissed for want of prosecution."

It seems to us that this order is not justified either by the circumstances of the case or by the provisions of the Provincial Insolvency Act, No. III of 1907. The debtor's petition had alleged facts sufficient, if established, to entitle him to present his petition under section 6, clause 3, of the said Act. After completing the necessary inquiries, the duty laid upon the court was to come to a decision in respect of the various matters spoken of in section 15 of the said Act and then either to dismiss the petition under the provisions of that section, or else to make an order of adjudication. On this point the words of section 16 (1) of the Act are clear and mandatory. We, therefore, allow this appeal and set aside the order of the court below. We return the record to that court with orders to re-admit it on to its file of pending applications and to dispose of it according to law. The appeal is not opposed and there is no necessity for us to make any order as to costs.*

Appeal allowed.

REVISIONAL CIVIL.

Before Mr. Justice Ryves.

SUKH LAL (DEFENDANT) v. NANNU PRASAD (PLAINTIFF). *

Act No. IX of 1887 (Provincial Small Courts Act, schedule II, article (31)—Small Cause Court—Jurisdiction—Suit by joint owners to recover rent of a house received by the other joint owner—Money had and received—Revision—Objection to jurisdiction not raised in court below.

Seems that a suit by one of two joint owners to recover from the other a share of the rent of a house received in the first instance by the defendant with the plaintiff's consent, is a suit for money had and received, and as such within the jurisdiction of a Court of Small Causes.

But in any case, the question of jurisdiction not having been raised in the court below and the case having apparently been correctly decided, the High Court was not bound to interfere in revision. *Ram Lal v. Kabul Singh* (1) followed

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IN this case plaintiff and defendant, nephew and uncle respectively, were joint owners of a house. The house was let to a tenant, and for some years the uncle had been in the habit of receiving the rent. The nephew instituted the present suit in a Court of Small Causes claiming a sum of Rs. 130, as his half share of the rent received by his uncle. The court tried the case, and the defendant took no objection to the jurisdiction. Ultimately a decree was given in favour of the plaintiff. The defendant came in revision to the High Court urging that the suit was not within the jurisdiction of a Court of Small Causes.

The Hon'ble Munshi *Narayan Prasad Ashthana*, for the applicant.

Pandit *Shiam Krishna Dar*, for the opposite party.

RYVES, J. :—This application arises out of a suit brought by a nephew against his uncle and a tenant. It appears that a house which jointly belonged to the nephew and uncle had for many years been rented by defendant No. 2 and the whole rent used to be collected by the uncle. No doubt, the nephew was entitled to a half share. This suit was brought to recover Rs. 130, being half of Rs. 260, which the uncle had been paid by the tenant. The suit was filed in a Court of Small Causes. Not only was no objection taken to the jurisdiction of that court, but in paragraph 8 of the written statement the uncle specifically stated that he raised no objection to the court trying the suit. Of course it is not open to parties to waive a question of jurisdiction, but for reasons to be stated later, I think this matter is of some importance. The court, from the judgment which it has recorded, tried the case apparently very fully, and came to what seems to me a very just decision. Having lost the suit in that court, the uncle applies to this Court for revision and for the first time raises the objection that the court below had no jurisdiction to try the suit, and he relies on article (31) of the schedule to the Act (Act No. IX of 1887). It is only the second part of that article which could apply, that is to say, "a suit for the profits of immovable property belonging to the

(1) (1902) 1, L. R., 25 ALL., 135.

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plaintiff which has been wrongfully received by the defendant " is barred from the cognizance of a Court of Small Causes. Reliance has been placed on *Rameshar Singh v. Durga Das* (1), *Uzir v. Hari Charan Pal* (2) and *Nand Runi v. Swashwanewar Mukerji* (3). It seems to me that it is by no means clear that this case comes within the scope of those rulings. It appears (in this particular case that the rent had been paid for many years by the tenant to the uncle. I therefore do not see how it can be said that the uncle " had wrongfully received " the rent, the subject-matter of this suit. It seems to me to be an ordinary suit for money had and received. In any case, I feel that substantial justice has been done and the only result of this application would be further litigation, and that between an uncle and a nephew, and I would hesitate to re-open the matter unless I am forced to. There is the authority of this Court in *v. Kabul Singh* (4), and I would refer also to the cases reported (in 37 Indian Cases, page 991 and 29 Indian Cases, 566) which give me a discretion. As I have already stated, I doubt as to whether article (31) strictly applies, and having also, I think, a discretion in the matter, I decline to interfere. The result is that the application is rejected with costs.

Application dismissed.

APPELLATE CIVIL.

1918
 June, 26.

Before Mr. Justice Tudball and Mr. Justice Abdul Raof.

TAMIZ-UN-NISSA BIBI AND ANOTHER (JUDGMENT-DEBTORS) v. NAJJU KHAN
 AND ANOTHER (DECREE-HOLDERS).*

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 182 (5)—Execution of decree—Limitation—Step in aid of execution.

An application to the court executing a decree asking that certain objections to the execution of the decree be rejected is a step in aid of execution within the meaning of article 182(5) of the first schedule to the Indian Limitation Act, 1908.

* Second Appeal No. 459 of 1917, from a decree of W. T. M. Wright, District Judge of Budaun, dated the 25th of January, 1917, confirming a decree of Kshirod Gopal Banerji, Subordinate Judge of Budaun, dated the 16th of September, 1916.

A DECREE absolute was passed in favour of Najju Khan and others on the 17th of February, 1910. The first application for execution of the decree was made on the 29th of November, 1911, and thereupon the court transferred the sale to the Collector on the 23rd of March, 1912, inasmuch as the property sought to be sold was ancestral. One Sadiq Ali brought a suit against the decree-holders claiming 6 biswansis out of 16 biswansis of the property sought to be sold and, on the 9th of July, 1913, Sadiq Ali's suit was decreed. Thereupon Sadiq Ali prayed that his 6 biswansis be exempted from sale. On the 18th of July, 1913, the decree-holders applied that the sale of the entire 16 biswansis be allowed to proceed as an appeal. Inst the decree obtained by Sadiq Ali was pending; but Sadiq Ali's prayer was sustained and his 6 biswansis were exempted. The present application for execution of the decree was made on the 27th of June, 1916. Both the courts below held that the application was within time, inasmuch as the previous application of the 18th of July, 1913, was a step in aid of execution. The lower appellate court relied upon the ruling of *Shagun Chand v. Ramjas* (1). The judgment-debtors appealed.

Maulvi *Iqbal Ahmad*, for the appellants.

Mr. *Ibn Ahmad*, for the respondents.

TUDBALL and ABDUL RAOOF, JJ. :—This is a judgment-debtors' appeal and the sole question is whether the decree-holders' application of the 18th of July, 1913, is an application made to a proper court to take a step in aid of execution. That application was an application to the court to reject certain objections which had been filed against the execution of the decree so as to enable the execution to proceed. It was in our opinion an application made to the proper court, and it was an application asking that court to take a step which was very necessary for the execution of the decree. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) (1910) 5 Indian Cases, 292.

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REVISIONAL CRIMINAL.

1918
June, 27.

Before Sir George Knox, Acting Chief Justice.

AZIZ-UR RAHMAN v. HANSA *

Act No. XIII of 1859 (Workmen's Breach of Contract Act)—Scope of the Act—Act applicable not merely to fraudulent breaches of contract.

The provisions of Act No. XIII of 1859, are not applicable merely to fraudulent breaches of contract, but can and must be enforced in respect of any breach of a contract within the scope of the Act. *Emperor v. Bakhtawar*, (1) followed.

THE parties lived in Agra, to which station the provisions of Act No. XIII of 1859, have been extended. The opposite party entered into a contract under this Act to do certain work for the applicant, and received an advance from him for this purpose. Subsequently, however, the opposite party refused to work according to his agreement. The applicant applied to the Joint Magistrate of Agra asking that the provisions of Act No. XIII of 1859 should be enforced against the opposite party. The Magistrate, however, holding that the Act in question only applied to *fraudulent* breaches of contract, refused to do more than direct the refund of the balance of the money advanced by the applicant. This the employer refused to accept upon the ground that he wanted performed the work which the opposite party had engaged to do, and he applied in revision to the High Court against the order of the Joint Magistrate and an order of the District Magistrate confirming the same.

The Hon'ble Munshi *Narayn Prasad Ashthana*, for the applicant.

The opposite party was not represented.

KNOX, A.C.J. :—This is an application for revision of an order passed by the Magistrate of Agra whereby an order of a first class Magistrate of Agra was confirmed. The first class Magistrate of Agra had before him an application asking him to enforce the provisions of sections 1 and 2 of Act No. XIII of 1859. All that appears before me on the record is an order in which the learned Magistrate arrives at the conclusion that the suit does not lie

* Criminal Revision No. 379 of 1918, from an order of W. H. Webb, District Magistrate of Agra, dated the 27th of February, 1918.

under Act No. XIII of 1859. No evidence appears to have been taken, and all that is on the record is the contract. Act No. XIII of 1859 is an Act which has been extended to the station of Agra. The contract is upon a stamp paper and it recites that it is a contract under Act No. XIII of 1859. The first class Magistrate sets out what he believes to be the obvious object of Act No. XIII of 1859. He says that "it was designed to prevent coolies or labour contractors fraudulently bolting with the advances necessary for obtaining work from them and it was not designed to secure the employer's enforcement of elaborate contracts with skilled artizans." I do not know from what source the learned Joint Magistrate obtains this. There is nothing in the Act to this effect. The learned Joint Magistrate will do well to consider the ruling by which he is bound, namely, *Queen Emprass v. Indarjit* (1). Having placed this interpretation upon the object of the Act the learned Joint Magistrate went on to pass an order for which there is no warrant that I know of. That order runs as follows :—"The accused should produce to-morrow the balance of money due to the complainant. If he does so and the complainant takes it, accused will be acquitted. If he does so and complainant refuses the money, the case will be dismissed. If he does not produce it, it will be a clear case of bad faith, and I shall proceed against him under Act No XIII of 1859." The morrow came, and the accused produced the money required of him. The complainant refused to take it, saying that he wished to have the work done by the accused. The learned Joint Magistrate professed to act upon a ruling of the Bombay High Court, *Queen Emprass v. Rajab* (2), to which he is not subordinate and which he should not follow when he has before him rulings of this Court. I cannot, moreover, sanction the unwarrantable language used by the Joint Magistrate regarding an Act in the statute-book. He says "it is altogether preposterous that this Act, designed to protect people who make cash advances in order to import or secure manual labour from people not worth powder and shot in the Civil Court, should be prostituted in this way by employers of skilled artizans." The learned Joint Magistrate had no right to use language of this kind regarding a

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1) (1889) I. L. R., 11 All., 262

(2) (1892) I. L. R., 16 Bom., 368.

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statute which is in force and which he is bound to respect. The Act is in full force in the station of Cawnpore for instance and for aught I know may be in full force in the station of Agra. I call the attention of the court below to the case of *O. J. Lucas v. Ramai Singh* and *Emperor v. Bakhtawar* (1), both to be found in I. L. R., 40 All. The learned Joint Magistrate says that he cannot compel Hansa to continue the work which he contracted to perform because it requires him to sit very near the fire. He is said to have been working in the same situation in another factory. This may or may not be true. But the matter should have been inquired into and evidence fully taken. This was not a case for summary disposal. I set aside the orders of both the courts below and I return the case in order that it may be dealt with strictly in accordance with the provisions of Act No. XIII of 1859.

Order set aside and case remanded.

APPELLATE CIVIL.

1918.
June, 28.

Before Mr. Justice Tudball and Mr. Justice Abdul Raoof.

NAND LAL SINGH (PLAINTIFF) v. BENI MADHO SINGH AND OTHERS
(DEFENDANTS)*

Costs—Joint decree for costs against defendants claiming under separate titles, defendants being also wrong-doers—Suit for contribution—Suit not maintainable.

Two persons, each holding by a separate title a half share in certain property were arrayed as co-defendants to a suit for recovery of a share in the said property. The plaintiffs obtained a decree with costs, the order for costs being as against the defendants jointly. The plaintiffs decree-holders executed the decree for costs against one of the judgment-debtors, and he then sued the other judgment-debtor for contribution. *Held* that the suit would not lie. *Fakire v. Tasaddug Husain* (2) followed.

THE facts of this case are fully set forth in the judgment of the Court.

The Hon'ble Dr. Tej Bahadur Sapru (with him Mr. Shammath Mushran and Pandit Kailas Nath Katju), for the appellant.

* Second Appeal No. 1246 of 1916, from decree of Murari Lal, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Cawnpore, dated the 9th of May, 1916, reversing a decree of Muhammad Jinnat, Munsif of Fatehpur, dated the 7th of February, 1916.

(1) (1886) I. L. R. 10 All. 282. (2) (1897) I. L. R. 19 All. 462.

Pandit *Baldeo Ram Dave* (with him Pandit *Braj Nath Vyas* and Munshi *Nawal Kishore*), for the respondents.

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TUDBALL and ABDUL RAOOF, JJ.:—The plaintiff appellant in this suit was a person who under a deed of gift executed by one Jagat Singh obtained a half share in certain property. The respondent Ram Lal Singh is a person who received a half share in the same property by an entirely separate deed of gift from that same Jagat Singh. Beni Madho Singh and Zalim are certain persons claiming to be the lawful owners of a certain share in the property. They brought a suit to recover their share and they impleaded both Ram Lal Singh and Nand Lal Singh in the suit. Ram Lal Singh did not defend the suit, but Nand Lal Singh did, and in the course of his pleadings he stated that Ram Lal Singh was at the bottom of the suit and that he had instigated the plaintiffs to sue. Part of the claim was decreed and part of the claim was dismissed. The plaintiffs appealed in respect to so much of their claim as was disallowed. Nand Lal Singh appealed in respect to so much of the claim as had been decreed against him. The plaintiffs' appeal was allowed, and Nand Lal Singh's appeal was dismissed. Ram Lal Singh was a respondent to both the appeals. He contested neither. In the execution department, Ram Lal Singh pleaded that no portion of the share decreed to the plaintiffs should be taken from him, but that it should all be taken from Nand Lal Singh. Nand Lal Singh opposed him. The court held that each of them had in his hands half of the share decreed. The appellate decree, which is the decree of this Court in the plaintiffs' appeal, shows clearly that this Court held that each defendant was separately liable in respect of the property which was in his hands. The order for costs was a joint one. The plaintiffs in the former suit have recovered the whole of their costs from Nand Lal Singh. He has now brought the present suit for contribution, claiming half from the defendant Ram Lal Singh. This is clearly not a case of joint *tort feasons*. Ram Lal Singh derived his title to the property which was in his hands by an entirely separate deed from Jagat Singh, and Nand Lal Singh derived his title, such as it was, by a separate deed of gift. The two defendants were not at one in defending

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statute which is in force and which he is bound to respect. The Act is in full force in the station of Cawnpore for instance and for aught I know may be in full force in the station of Agra. I call the attention of the court below to the case of *O. J. Lucas v. Ramar Singh and Emperor v. Bakhtawar* (1), both to be found in I L R, 40 All. The learned Joint Magistrate says that he cannot compel Hansa to continue the work which he contracted to perform because it requires him to sit very near the fire. He is said to have been working in the same situation in another factory. This may or may not be true. But the matter should have been inquired into and evidence fully taken. This was not a case for summary disposal. I set aside the orders of both the courts below and I return the case in order that it may be dealt with strictly in accordance with the provisions of Act No. XIII of 1859.

Order set aside and case remanded.

APPELLATE CIVIL.

1918
June, 28.

Before Mr. Justice Tudball and Mr. Justice Abdul Raoof.

NAND LAL SINGH (PLAINTIFF) v BENI MADHO SINGH AND OTHERS
(DEFENDANTS)*

Costs—Joint decree for costs against defendants claiming under separate titles, defendants being also wrong-doers—Suit for contribution—Suit not maintainable.

Two persons, each holding by a separate title a half share in certain property were arrayed as co-defendants to a suit for recovery of a share in the said property. The plaintiffs obtained a decree with costs, the order for costs being as against the defendants jointly. The plaintiffs decree-holders executed the decree for costs against one of the judgment-debtors, and he then sued the other judgment-debtor for contribution. *Held* that the suit would not lie. *Fakire v. Tasadduq Husain* (2) followed.

THE facts of this case are fully set forth in the judgment of the Court.

The Hon'ble Dr. Tej Bahadur Sapru (with him Mr. Shamnath Mushran and Pandit Kailas Nath Katju), for the appellant.

* Second Appeal No. 1246 of 1916, from decree of Murali Lal, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Cawnpore, dated the 9th of May, 1916, reversing a decree of Muhammad

Pandit Baldeo Ram Dave (with him Pandit Braj Nath Vyas and Munshi Nawal Kishore), for the respondents.

TUDBALL and ABDUL RAOOF, JJ.:—The plaintiff appellant in this suit was a person who under a deed of gift executed by one Jagat Singh obtained a half share in certain property. The respondent Ram Lal Singh is a person who received a half share in the same property by an entirely separate deed of gift from that same Jagat Singh. Beni Madho Singh and Zalim are certain persons claiming to be the lawful owners of a certain share in the property. They brought a suit to recover their share and they impleaded both Ram Lal Singh and Nand Lal Singh in the suit. Ram Lal Singh did not defend the suit, but Nand Lal Singh did, and in the course of his pleadings he stated that Ram Lal Singh was at the bottom of the suit and that he had instigated the plaintiffs to sue. Part of the claim was decreed and part of the claim was dismissed. The plaintiffs appealed in respect to so much of their claim as was disallowed. Nand Lal Singh appealed in respect to so much of the claim as had been decreed against him. The plaintiffs' appeal was allowed, and Nand Lal Singh's appeal was dismissed. Ram Lal Singh was a respondent to both the appeals. He contested neither. In the execution department, Ram Lal Singh pleaded that no portion of the share decreed to the plaintiffs should be taken from him, but that it should all be taken from Nand Lal Singh. Nand Lal Singh opposed him. The court held that each of them had in his hands half of the share decreed. The appellate decree, which is the decree of this Court in the plaintiffs' appeal, shows clearly that this Court held that each defendant was separately liable in respect of the property which was in his hands. The order for costs was a joint one. The plaintiffs in the former suit have recovered the whole of their costs from Nand Lal Singh. He has now brought the present suit for contribution, claiming half from the defendant Ram Lal Singh. *This is clearly not a case of joint *tortfeasors*. Ram Lal Singh derived his title to the property which was in his hands by an entirely separate deed from Jagat Singh, and Nand Lal Singh derived his title, such as it was, by a separate deed of gift. The two defendants were not at one in defending

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the suit. They were as a matter of fact opposed to each other. Paragraph 15 of the written statement of Nand Lal Singh shows this clearly. Ram Lal Singh in no way contested the suit, whereas Nand Lal Singh did, and it is quite clear that the extra costs that were incurred in that suit were due to the action of the present plaintiff Nand Lal Singh alone. The case is very much like that of *Fakire v. Tasaddug Husain* (1). In this case there was no contract between the present parties. Each was in separate possession of property and there was nothing joint. Each was separately liable for the trespass that he had committed. Each trespass was committed separately, and each defendant's liability for mesne profits was entirely separate. The only thing common between them was that they were arrayed as defendants to the suit. We cannot find any equity in the present case that will enable us to hold that the respondent Ram Lal Singh is in any way liable to the plaintiff for a share of the costs that were recovered from him. The appeal is dismissed with costs to Ram Lal Singh.

It is to be noted that the action of the plaintiff is directed solely against Ram Lal Singh and not against the other respondents. This is clearly admitted before us in open Court.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Ryves.

1918
 June, 29.

BIHARI LAL (JUDGMENT-DEBTOR) v. BALDEO NARAIN AND OTHERS
 (DECREE-HOLDER).*

Civil Procedure Code (1908), section 115—*Revision—Jurisdiction of High Court—Question of law or fact bearing on jurisdiction of Court.*

When a question of jurisdiction is involved, the High Court is competent to revise a conclusion of law or fact which bears on such question.

Balakrishna Udayar v. Vasudeva Ayyar (2) explained.

THE facts of this case were as follows:—

A suit was filed against a minor, Bihari Lal, under the guardianship of his brother Gaya Prasad, and a simple money decree was passed against him for a sum of Rs. 238-15-0. In

* Civil Revision No. 50 of 1918.

(1) (1897) I.L.R., 19 All. 462, (2) (1917) I.L.R., 40 Mad., 798.

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execution of that decree, house property belonging to the minor was attached and advertised for sale. The sale was fixed for the 14th of April, 1917. On the 13th of April, an application was made by Gaya Prasad as guardian of the minor for adjournment of the sale. The application was presented by a vakil of the Court under a vakalatnama signed by Gaya Prasad. In the body of the vakalatnama the name of the executant was left blank, but it was executed by Gaya Prasad, though he did not indicate when signing it that he signed as guardian of his minor brother. With the application, however, was filed an affidavit by Gaya Prasad which showed that he was acting in the matter as guardian of the minor. The Court granted an adjournment of the sale until the 20th of April; but on that date the sale was held and the property was knocked down to a stranger for Rs. 180, very much less than its real value. On the 4th of May, 1918, application was made on behalf of the minor by the same vakil, under order XXI, rule 89, of the Code of Civil Procedure, and the proper amount was paid into Court within time. The Court of first instance rejected the application partly on the allegation of vagueness and want of compliance with the provisions of order XXXII, rule 5(1) of the Code of Civil Procedure, but mainly because it was not presented by anyone duly authorized to represent the minor. On appeal, the lower appellate court for the last-named reason affirmed the order of court below. The minor applied in revision to the High Court.

The Hon'ble Pandit *Moti Lal Nehru* and Pandit *Radha Kant Malaviya* for the applicant.

Mr. *W. Wallach*, Dr. *S. M. Sulaiman*, Mr. *Ibn Ahmad*, the Hon'ble Dr. *Tej Bahadur Sapru* and Babu *Sital Prasad Ghosh*, for the opposite party.

RYVES, J.:—The facts out of which this application arises are admitted. A suit was filed against a minor, Bihari Lal, under the guardianship of his brother, Gaya Prasad, and a simple money-decree was passed against him for a sum of Rs. 238-15-0. In execution of that decree, house property belonging to the minor was attached and advertised for sale. The sale was fixed for the 14th of April, 1917. On the 13th of April, 1917, an application was made by Gaya Prasad, as guardian of the minor,

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as ng for the adjournment of the sale. The application was put in by a vakil of the court under a vakalatnama executed by Gaya Prasad. In the body of the vakalatnama which is a printed document, and which is usually filled in by the vakil himself or his clerk, the name of Gaya Prasad was not entered. The document reads " I . . appoint" so and so. It was executed by Gaya Prasad. Of this there is no question, but he did not add that he was executing it as the guardian of the minor. Along with this application there was filed an affidavit by Gaya Prasad. Taking the two together, it was quite obvious that the application for adjournment was being made by him as guardian of the minor through the vakil whom he had appointed to act for him. The court accepted the application to this extent that it granted an adjournment of the sale for six days, and the 20th of April, 1917, was fixed. On that date the sale was held and the property was knocked down to an outsider, i. e., to a person who was no party to the suit, for a sum of Rs. 180, the opposite party here. It is admitted that the property was worth a very great deal more than what it was knocked down for. On the 4th of May, 1917, an application was made under order XXI, rule 89, by the same vakil. It purported to be tendered on behalf of the minor. The proper amount had been paid into court within the time allowed and the application must have been accepted by the court and the sale set aside unless the application was not in order. The court of first instance rejected the application in these terms :—" This application under rule 89, order XXI, of the Code of Civil Procedure has been presented by the applicant, who is a minor and it is not presented by a next friend. The minor's application was filed through a pleader who does not appear to have been retained by him, *vide* the vakalatnama. The application is against the provisions of rule 5 (1), order XXXII, of the Code of Civil Procedure and is also vague. No order can legally be passed on it without the minor being represented by a next friend. I therefore reject this application with costs." That is the order really in question here. The lower appellate court found, and rightly found, that the application in itself was not vague and that it entirely complied with order XXI, rule 89, but it held substantially for the same reason as the first

court that the application had not been properly presented on behalf of the minor, and rejected the application. From this order no appeal lies to this Court ; hence an application in revision.

Two arguments are raised against my interfering. First of all it is said, on the authority of *Balakrishna Udayar v. Vasudeva Ayyar* (1), and three recent rulings of this Court reported in I. L. R., 40 Allahabad, pages 425 and 612, and 16 A. L. J., page 535, that this Court has no power to interfere. It is said that the lower court had jurisdiction to go wrong and that, assuming it did go wrong, its decision is final. Secondly, it is argued on the merits that the decision on the point of law is correct.

It seems to me that, put in plain language, the court declined to hear the applicant. It declined to hear the minor himself, because of his minority, and it declined to hear the pleader because of a supposed defect in his vakalatnama. It seems to me that if the court was wrong in its reasons for not hearing the pleader and therefore not accepting the application, it declined to exercise a jurisdiction vested in it, or at least acted with material irregularity in the exercise of its jurisdiction.

There is one passage in the judgment of the Privy Council report in I. L. R., 40 Mad, 793, which, read by itself, and separated from the context and read without consideration of the facts of that case, does support the objection of the opposite party. It is the sentence which is reported at page 799, and runs as follows:—"It will be observed that the section (115) applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it." But the judgment does not end there, it goes on to say:—"The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved, and if the appellants' contention be correct, then, if the Civil Court should absolutely and whimsically decline to exercise its jurisdiction and refuse to make any orders as to the filling up of vacancies, no matter how many existed, there would not, in a case such as the present, be any remedy available under this section and no appeal would lie." In that case the District Judge purporting to act under a particular section of a particular Act, construing the section as he did, held that he had jurisdiction

(1) (1917) I. L. R., 40 Mad. 793.

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to pass a particular order, and passed it. Objection was taken to this order before the successor of the District Judge on the ground that the former District Judge had no jurisdiction to pass it. The court held that he had. An application was then made to the High Court of Madras in revision, and it was argued that the High Court had no power to interfere, one argument being that the decision of the court below was at the most a wrong decision on a point of law. The High Court repelled this objection and did interfere in revision, and the Privy Council upheld its decision. It seems to me what the Privy Council case decided was that the section (115 of the Code of Civil Procedure) is not directed against conclusions of law or fact *in which the question of jurisdiction is not involved*. (I think the words which I have italicized are most important.) It seems to me to follow from this that where a question of jurisdiction is involved this Court is competent to revise a conclusion of law or fact which bears on a question of jurisdiction. In the case before me it seems to me that on the point of law decided, a question of jurisdiction is involved, therefore I think I have jurisdiction to consider that point on the merits.

Three recent cases of this Court, however, are quoted in support of the objection. The first case is that of *Fazal Rab v. Manzur Ahmad* (1) On the face of it, that case looks very like the present case, but there the only point decided was that payment of money into the Treasury was not a payment into court within the meaning of rule 89, order XXI, and this Court held that, if that decision was a wrong one it could not be set aside in revision. There no question of jurisdiction was involved. In the next case (*Jhunku Lal v. Bisheshar Das*) at page 612 of the same volume, (2) also no question of jurisdiction was involved. In the last case, to which I was a party, a question of jurisdiction was involved. The case was decided only a very short time ago and I remember perfectly well that we did go into the merits and were satisfied that the order of the courts below in returning the plaint, was a proper order and one which the courts had jurisdiction to pass and should have passed. That case, therefore, in my opinion is not a helping guide. In that case no authorities were

cited. I must confess that I had not then studied the Privy Council case in 40 Madras as carefully as I have since done, and I am inclined to think that perhaps our judgment was expressed unnecessarily broadly. It seems to me on full consideration that the Privy Council case gives me jurisdiction to go into the merits of the decision in this case on the point of law involved.

There is one other aspect of the case, which I think should not be lost sight of. The defects, if any, in the application or the power of attorney, were purely technical, and seeing that the property of a minor was at stake, I think, that if the court had doubts, it would have been well advised to have called evidence and ascertained whether the guardian had in fact authorized the vakil to make the application. I do not, however, base my judgment on this consideration, though in my opinion it has weight.

On the merits:—The application of the 4th of May, 1917, purported, as I have said, to be made by the vakil on behalf of the minor. There was no fresh vakalatnama, it is admitted, executed by the guardian of the minor authorizing the vakil specifically to file this application. It seems to me that no new vakalatnama was required for this particular application. The vakil had been appointed by Gaya Prasad to appear for the minor in a former stage of the litigation and also to put in the application of the 13th of April, asking for an adjournment of the sale in these very execution proceedings. If that appointment was a good appointment then it seems to me that it was still in force under order III, rule 4, of the Code of Civil Procedure. But it is argued that the vakalatnama executed by Gaya Prasad was not valid for two reasons. One was that the clerk of the vakil or somebody should have recorded in the body of the application, for a second time, the statement that it was Gaya Prasad who was making the appointment, and making it as guardian of the minor. As the vakalatnama runs, Gaya Prasad and no one else was making the appointment. It says so, "I . . . appoint". And although that vakalatnama was executed by Gaya Prasad, it is said to be invalid, as there was no statement in it to the effect that Gaya Prasad executed it as "guardian of the minor" or some such words. This seems to me a very technical objection. Except as guardian of the

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minor he had nothing whatever to do with the suit or the proceedings in execution. I have already said he himself came into court and made the application for the stay of the sale on the 13th of April, and put in an affidavit. The application showed that he had appointed the vakil to act for the minor of whom, he, Gaya Prasad, was the guardian. It seems to me, therefore, that the application of the 4th of May, was in order, and that the court has failed to exercise its jurisdiction in not accepting it because it came to a wrong decision on a point of law. Undoubtedly if it had decided, as I think it should have decided, it should have accepted the application. I, therefore, setting aside the order of the court below, pass the order which I think it should have passed, *i. e.*, I direct that the money paid into court be made over to the purchaser and the sale be set aside. The applicant will have his costs throughout

Application allowed.

APPELLATE CIVIL.

1918
 July, 1.

Before Justice Sir Pramada Chaman Banerji and Mr. Justice Ryves.

LALIA RAM (PLAINTIFF) v. THAKUR PRASAD (DEFENDANT).*

Civil Procedure Code (1908), section 60(c); order XXI, rule 92—Execution of decree—Sale in execution—House of an agriculturist—Objection not taken at time of sale, but in answer to a suit for possession by the auction-purchaser—Estoppel.

Held that a judgment-debtor, who could and ought to have raised objections to the sale of his property at the time of the sale, could not be permitted long after the sale had been confirmed to raise the same objections in answer to a suit by the auction purchaser for possession of the property purchased by him. *Uned v. Jas Ram* (1), *Pandurang Balaji Bagave v. Krishnaji Govind Parab* (2) and *Doolanath Pal v. Thunni Sankar Ray* (3) followed.

The facts of this case were as follows:—

In execution of a decree obtained against one Thakur Prasad a house belonging to him was sold by auction on the 23rd of November, 1910. The purchaser obtained formal, but not actual, possession. He accordingly brought the present

* Second Appeal No. 1340 of 1916, from a decree of *Piero Lal Katara*, Subordinate Judge of Muzpuri, dated the 13th of April, 1916, confirming a decree of *Prom Behari*, Munsif of Muzpuri, dated the 25th of May, 1915.
 (1) (1907) I. L. R., 29 All., 612. (2) (1903) I. L. R., 28 Bom., 125.
 (3) (1907) I. L. R., 34 Cal., 199.

suit to obtain physical possession of the house which he had purchased. The suit was resisted on the ground that the house in question was the house of an agriculturist and was therefore not liable to sale in execution of a decree in view of the provisions of section 60 (c) of the Code of Civil Procedure. The suit was on this ground dismissed, and on appeal the decree of the first court was affirmed. The plaintiff appealed to the High Court raising two questions. The first was that the lower appellate court ought to have determined whether the house was the house of an agriculturist or was appurtenant to the house of an agriculturist within the meaning of clause (c) of section 60; and, secondly, even if the house was of the description mentioned in that clause, whether, after the sale and confirmation of sale, it was open to the defendant to question the validity of the sale and the title which the plaintiff had acquired under it.

Munshi *Baleshwar Prasad*, for the appellant.

Munshi *Girdhari Lal Agarwala*, for the respondent.

BANERJI and RYVES, JJ.:—This appeal arises out of a suit brought by the plaintiff appellant for possession of a house which originally belonged to the defendant respondent. In execution of a decree obtained against the said defendant the house was sold by auction so far back as the 23rd of November, 1910, and it was purchased by the plaintiff. He obtained formal delivery of possession, but as he did not get actual possession, he brought the present suit. The claim was contested on the ground that the house claimed was the house of an agriculturist and was therefore not liable to sale in execution of a decree in view of the provisions of section 60 (c) of the Code of Civil Procedure. This objection prevailed in the courts below and the suit was dismissed. The plaintiff has preferred this appeal and he raises two questions. The first is that the lower appellate court ought to have determined whether the house was the house of an agriculturist or was appurtenant to the house of an agriculturist within the meaning of clause (c) of section 60; and, secondly, even if the house was of the description mentioned in that clause whether, after that sale and confirmation of sale, it was open to the defendant at this stage to question the validity of the sale and the title which the plaintiff had acquired under it. As

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regards the first point, the lower appellate court says that it was a fact not disputed that the defendant was a tenant and that the house in dispute was an appurtenance to his tenancy. We must accept this statement of fact as correct and assume that the house in dispute is an appurtenance to the tenancy of an agriculturist as such. If an objection had been taken before the auction sale it ought not to have been sold; but the question which arises is whether after the sale and the confirmation of the sale its validity can now be questioned by the defendant, as against whom the sale has become conclusive by reason of its confirmation. Under order XXI, rule 92, after a sale has taken place and has been confirmed the auction-purchaser acquires a title to the property. In the present instance no objection to the sale was raised before it took place or at any time. It is not suggested in the pleadings that the defendant judgment-debtor was not aware of the execution proceedings. As between him and the auction-purchaser the sale has become conclusive and the auction-purchaser has acquired a vested interest in the property sold. If objection had been raised on behalf of the defendant before the auction sale, the court would have had jurisdiction to consider and decide whether the property was of the description mentioned in section 60(c), and if it had decided that the property was liable to sale and no appeal had been preferred against such decision, the sale of the property could never be questioned. In the present case no objection having been taken and the sale having become conclusive as between the parties, it is not open, in our opinion, to the defendant after the lapse of so many years from the date of the sale to contend that the sale ought never to have taken place and conveyed no title to the purchaser. This view is supported by the decision of this Court in *Umed v. Jas Ram* (1), and also by the decision referred to in the judgment in that case. The rulings of the Bombay High Court in *Pandurang Balaji Bagave v. Krishnaji Govind Parab* (2) and of the Calcutta High Court in *Dwarkanath Pal v. Tarini Sankar Ray* (3) are to the same effect. The only case in which a contrary view appears to have been held is the unreported

(1) (1907) I. L. R., 29 All., 612. (2) (1903) I. L. R., 28 Bom., 125.

(3) (1907) I. L. R., 34 Cal., 199.

judgment of a single Judge of this Court in Second Appeal No. 327 of 1910, decided on the 16th of January, 1911. In that case the learned Judge held that an objection as to attachment and sale could not be made before the auction sale. We are unable to agree with this view, and we do not feel ourselves justified in following that ruling in the face of the other rulings to which we have already referred. The result is that we allow the appeal, set aside the decrees of the courts below and decree the plaintiff's suit with costs in all courts.

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Appeal allowed.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Ryves.

WAZIR ALI AND ANOTHER (DEFENDANTS) v. ALI ISLAM (PLAINTIFF).
Act No. IX of 1908 (Indian Limitation Act), schedule I, article 148—*Limitation—Usufructuary mortgage—Redemption—Right of purchaser of equity of redemption in part of the mortgaged property.*

1918
July, 2.

A purchaser of the equity of redemption in a part of the mortgaged property is entitled to redeem his own portion of the property within sixty years of the date of the mortgage from another person who, having purchased another portion of the mortgaged property, has redeemed the entire mortgage and is in possession of the entire property. The limitation applicable to a suit of this description is that provided by article 148 of schedule I to the Indian Limitation Act *Ashfaq Ahmad v. Wazi Ali* (1) followed. *Jai Kishan Joshi v. Budhanand Joshi* (2) referred to.

THE facts of this case, so far as they are necessary for the purposes of this report, are as follows:—

On the 21st of December, 1864, one Iradat-ullah made a usufructuary mortgage of certain shares in four villages, one of which was the village Gangapur. The equity of redemption in one of the mortgaged villages, namely, Pul Ratni, was sold by auction and purchased by one Mazhar Ali in 1874. He sold it in 1882, and the share which he purchased ultimately came to one Sarju Singh. In 1887, Sarju Singh brought a suit for redemption and got a decree for redemption of all the four mortgaged villages and obtained possession in 1891. The present appellant Wazir

* Second Appeal No. 1395 of 1916, from a decree of I. B. Mundla, District Judge of Azamgarh, dated the 24th of August, 1916, confirming a decree of Suraj Narain Majju, Subordinate Judge of Azamgarh, dated the 18th of February, 1916.

(1) (1889) I. L. R., 14 All., 1. (2) (1915) I. L. R., 38 All., 138.

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Ali was the purchaser of the rights of Sarju in Gangapur and he obtained possession by virtue of his purchase. In 1873 the share obtained in Gangapur was purchased at auction by Kali Charan, defendant No. 15, who sold it to the plaintiff on the 11th of October, 1913. By virtue of this purchase the plaintiff brought the present suit on the 18th of May, 1915, for redemption of Gangapur as against Wazir Ali, who was in possession of that village. He made other persons parties to the suit, one of these being Musammat Saidan Bibi, the second appellant, the widow of Iradat ullah, the mortgagor. The court of first instance decreed the claim and the decree of that court was confirmed by the lower appellate court.

The defendants appealed to the High Court.

Mr. *M. L. Agarwala*, Dr. *S. M. Sulaiman*, the Honble Dr. *Tej Bahadur Sapru* and Dr. *Surendro Nath Sen*, for the appellants.

Munshi *Gokul Prasad*, for the respondent.

BANERJI and RYVES, JJ. :—This appeal arises out of a suit for redemption brought under the circumstances mentioned in detail in the judgment of the court below. It is unnecessary to repeat all the facts, and it is sufficient to say that on the 21st of December, 1864, one Iradat-ullah made a usufructuary mortgage of certain shares in four villages, one of which was the village Gangapur. The present suit is for the redemption of that village. The equity of redemption in one of the mortgaged villages, namely, Pul Ratni, was sold by auction and purchased by one Mazhar Ali in 1874. He sold it in 1882, and the share which he purchased ultimately came to one Sarju Singh. In 1887, Sarju Singh brought a suit for redemption and got a decree for redemption of all the four mortgaged villages and obtained possession in 1891. The present appellant, Wazir Ali, is the purchaser of the rights of Sarju in Gangapur and he is in possession by virtue of his purchase. In 1873 the share in Gangapur was purchased at auction by Kali Charan, defendant No. 15, who sold it to the plaintiff on the 11th of October, 1913. By virtue of this purchase the plaintiff brought the present suit on the 18th of May, 1915, for redemption of Gangapur as against Wazir Ali, who is in possession of that village. He has made

other persons parties to the suit, and one of these is Musammât Saidan Bibi, the second appellant, the widow of Iradat-ullah, the mortgagor. The court of first instance decreed the claim and the decree of that court was confirmed by the lower appellate court.

The first contention raised before us on behalf of the appellants is that the claim is time-barred. This point is concluded by the authority of the Full Bench decision in *Ashfaq Ahmad v. Wazir Ali* (1). This case has been followed in subsequent cases by this Court, and we as a Divisional Bench are bound by it. Following that ruling, we must hold that the limitation applicable to a suit of this description is that provided by article 148, namely, sixty years from the date on which the mortgage became capable of redemption. It is contended that the word "co-mortgagor" should not be extended to a purchaser of the equity of redemption. We are unable to agree with this contention. All persons who have stepped into the shoes of the original mortgagor are "co mortgagors" for all purposes, and therefore the rule laid down in the Full Bench case is applicable to the present case, which is that of a purchaser of the equity of redemption in a part of the mortgaged property.

The learned counsel for the appellant referred to the case of *Jai Kishan Joshi v. Budhanand Joshi* (2). That case, so far from helping him, seems to us to be against his contention. That case was decided mainly on the ground that the representatives of the mortgagor who had redeemed the mortgage had asserted a proprietary title and claimed adversely to the true owner. It was held that in a case of that description article 144 would apply, but one of the learned Judges who decided the case observed as follows at page 144 of the report :—

"If Jaidat had not dealt further with the property, but had merely taken possession and held it, the plaintiff would, (under the ruling of this Court in *Ashfaq Ahmad v. Wazir Ali* (1), have had a period of sixty years from the date of the mortgage of 1860 within which to recover his share from Jaidat on payment of his share of the debt."

We are accordingly of opinion that the court below was right in holding that the limitation applicable to the case was that

(1) (1889) I. L. R., All., 1. (2) (1915) I. L. R., 38 All., 198.

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provided by article 148 and that the suit was not barred by limitation.

It was next contended that the suit should be deemed to be one for a declaratory decree as regards the title of the plaintiff or his vendor, Kali Charan. This contention is, in our opinion, untenable, as the suit is not for a declaratory decree but for consequential relief, namely, redemption of the mortgage and possession of the property. For the purpose of maintaining the suit it was necessary for the plaintiffs to ask the court to declare his title.

The last contention put forward was that as Kali Charan did not bring a suit to assert his title within twelve years of the date of his purchase that title must be deemed to have become extinct. This contention has no force, inasmuch as Kali Charan had no occasion to bring a suit to establish his title. The mortgagee was in possession and the possession of the mortgagee must be deemed to be that of the person entitled to the equity of redemption.

For these reasons the appeal must, in our opinion, fail. We dismiss it with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball and Mr. Justice Abdul Raouf

EMPEROR v. QUTAB AND OTHERS

1918.
July, 4.

*Act No. XLV of 1860 (Indian Penal Code), sections 325, 500, exception 4—
Grievous hurt—Murder—Culpable homicide not amounting to murder—
Fatal assault committed by three persons acting in concert.*

A dispute having suddenly arisen concerning the cutting of a sugarcane crop, three men armed with *lathis* attacked one of the men who was engaged in cutting the crop and beat him so severely that he died his skull being broken in three pieces. A nephew of the man attacked, having his *lathi* with him, attempted to rescue his uncle, and also received considerable injuries.

Held that the offence of which the assailants were guilty was not the mere causing of grievous hurt, but culpable homicide, which, however, might in the circumstances, be considered as not amounting to murder by the application

Criminal Revision [No. 282 of 1918, from an order of Jagat Narain, District Additional Sessions, Judge of Aligarh, dated the 9th of February.

of exception 4 of section 300 of the Indian Penal Code. *Emperor v. Chandan Singh* (1) dissented from. *Emperor v. Hanuman* (2), and *Emperor v. Ram Nivas*, (3) referred to.

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THE facts of this case are fully stated in the judgment of the Court.

The Assistant Government Advocate (Mr *R. Malcomson*), for the Crown.

The opposite parties were not represented.

TUDBALL and ABDUL RAOOF, JJ :—Notice was issued by a learned Judge of this Court to the three persons Gulab, Majid and Ghafur to show cause why they should not be convicted of an offence punishable under section 304 of the Indian Penal Code, why the sentences passed on them should not be enhanced, or why they should not be ordered to be re-tried on a charge under section 302 of the Indian Penal Code. The facts of the case, as found by the court below and which appear to us to have been correctly found, are as follows:—There was a sugarcane crop standing in three fields. It had been sown by the deceased Hardial and his partners Jahangir, Bhagwan Sahai and others. These fields had been given to Hardial by the accused to enable him to recoup himself for certain moneys which he had advanced to them and which were due to him from them. The mortgage of an occupancy holding is of course contrary to law. No bond was executed in this case, but the fields were actually made over to Hardial and he cultivated them. One of his duties was to pay the rent. The evidence shows that he had failed to pay two instalments. On the date in question he and his friends and his nephew Ganga Prasad were cutting the sugarcane crop when the three accused appeared upon the scene and Gulab objected to his cutting the crop as he had not paid the rent. Hardial replied that he had intentionally not paid the rent because the accused owed him other money and that he had set it off against the debt. Abuse followed between the parties and thereupon, according to the evidence for the prosecution, the three men attacked Hardial with their *lathis*. Ganga Prasad was also armed with a *lathi* and a regular fight took place between two men on one side and three on the other. The result was considerable injuries on both

(1) (1917) I. L. R., 40 All., 103. (2) (1918) I. L. R., 35 All., 560.

(3) (1918) I. L. R., 35 All., 506.

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sides. Hardial received three blows on the head, one on the cheek, one across the ear and some on his body. The injuries on the head were all on the right side. According to the evidence for the prosecution, some of the injuries were inflicted after he had been knocked down and the fact that the injuries on the face, ear and head are all on the right side, is some indication of the fact that this really occurred. Ganga Prasad also received considerable injuries. Upon other persons arriving at the scene, the accused fled. The court below has convicted the accused under section 325 of the Indian Penal Code of having voluntarily caused grievous hurt, relying upon the ruling in the case of *Emperor v. Chandan Singh* (1). It is obvious that the offence of culpable homicide either amounting to murder or not amounting to murder was committed. A man's life has been taken. It is obviously impossible in cases of this description to be able to prove that the fracture of the skull which resulted in death was caused by a blow from the *lathi* of any special one of the assailants. In the present instance Hardial had three fractures of the skull and had received three *lathi* blows upon the head. The three accused were all armed with the same class of weapon. They all attacked Hardial. A *lathi* is a lethal weapon, as has been repeatedly held in this Court for very many years. The person who uses a *lathi* must know on an occasion like this, that he is very likely to cause death. The three accused were moved by a common intention. That intention may not have been to cause death, but in carrying out their intention they all used deadly weapons and they must be deemed to have known that they were likely to cause death. We cannot agree that the accused can only be convicted of voluntarily causing grievous hurt. It is impossible to say whose *lathi* fractured the skull. The other blows inflicted on the body of Hardial caused only simple hurt. It appears to us that the present case falls within exception 4 of section 300 of the Indian Penal Code, wherein it is stated 'that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.' If five or more persons had banded together in this matter on behalf of the accused, no one would have hesitated

(1) (1917) L. L. R., 40 All, 193.

to have held all five guilty of the offence of culpable homicide not amounting to murder (section 149 of the Indian Penal Code). Why, because the number is reduced to three, these three should not be equally guilty under section 304 of the Indian Penal Code, we fail to understand. If one man alone had committed the offence, he also would have been convicted under section 304 of the Code. It is illogical to say because two others joined with him with similar weapons that therefore the offence committed by the three is reduced to the lesser offence of voluntarily causing grievous hurt. With all due respect to the learned Judge who decided it we find it impossible to agree with the opinion expressed in the case of *Emperor v. Chandan Singh* (1). If the facts were as they are reported, then the offence in our opinion was not even one under section 304 of the Indian Penal Code. It was a cruel and a brutal assault, premeditated and committed for the purpose of revenge upon an unfortunate man. The offence committed appears to us nothing more or less than murder and all three accused were equally guilty, as they were clearly moved by the same intent and had the same object and all three used lethal weapons. We do not agree with the view of the law taken in that case, and in that respect we would point out that it was quite inconsistent with the remarks to be found in the case of *Emperor v. Hanuman* (2). The remarks at page 563 are worthy of note. They run as follows:—"It is impossible to prove by direct evidence the intention of a particular individual. The intention can only be inferred from the reasonable and probable result of his act or conduct. The learned Judge seems to confuse the meaning of the term intention with desire. It is quite possible that those persons had no wish either collectively or individually to kill Sheoratan (as is indicated by the fact that no wound was discovered on his head), but nevertheless, if they beat him in the way it is proved that they did, they must be taken to have had knowledge that their act must in all probability cause death or such bodily injury as was likely to cause death, and if so, they are guilty of murder. Under circumstances such as these, it is quite immaterial to ascertain whose blow was the immediately fatal one." The learned Judges who decided that case distinctly

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(1) (1917) I. L. R., 40 All., 103. (2) (1913) I. L. R., 35 All., 560.

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dissented from the rule of law laid down in the case of *Dhian Singh v. King Emperor* (1), which was a judgment of a single Judge of this Court. They distinctly say "we cannot agree with the rule of law laid down in *Dhian Singh v. King Emperor*." We would also call attention to the decision of this Court in the case of *King-Emperor v. Newaz* (2). This was similarly a case of three men who with the same intent and object attacked one other. They were armed with *lathis*. They inflicted serious injuries which resulted in death. All three of them were found guilty of the offence of murder. These cases no doubt are distinguishable from the case before us, for here the matter was a sudden one, it sprang up suddenly and the injuries were inflicted in the heat of passion. We think that the case falls within exception 4 of section 300 of the Indian Penal Code. We, therefore, alter the conviction in the present case from one under section 325 of the Indian Penal Code to one under section 304 of the Indian Penal Code, and in view of the circumstances of the case, we do not think it necessary to enhance the sentences that have been passed.†

APPELLATE CIVIL.

1918
 July, 9.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.
 SHAMSHER SINGH AND OTHERS (DEFENDANTS) v. PIARI DAT (PLAINTIFF)
 AND SUBEDAR AND OTHERS (DEFENDANTS) *

*Pre-emption—Custom—Wajib-ul-arz—Property to be sold to co-sharer if it -
 Sale to stranger — "Refusal to purchase."*

As a general rule the custom as to pre-emption as evidenced by the record in the *wajib-ul-arz*, is that where a co-sharer wishes to sell his property he must first offer it to another co-sharer and if the co-sharer refuses to purchase, he is entitled to go to a stranger. Where the custom proved is of this nature, if the co-sharer (vendor) offers property to another co-sharer and such co-sharer refuses to purchase on the ground that he has no money or is unwilling for any other reason to purchase, the owner of the property is entitled to go and sell it to a stranger, and he is not obliged, after he has made a definite agreement with the stranger to return and offer the property a second time to the

* First Appeal No. 255 of 1916, from a decision of Piaro Lal Kataia, Subordinate Judge of Mainpuri, dated the 23rd of September, 1916.

(1) (1912) 9 A. L. J., 180.

(2) (1913) 1 L. R., 35 All., 506.

But see also *Emperor v. Bhole Singh*, 1 L. R., 29 All., 283.—Ed.

co-sharer *Nawthal Singh v. Ram Ratan* (1) and *Nathu Lal v. Dhane Ram* (2) followed. *Munawar Husain v. Khadim Ali* (3) and *Kanhari Lal v. Kalka Prasad* (4) not followed.

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THIS was a suit for pre-emption based upon a custom recorded in the wajib-ul-arz to the effect that a co-sharer wishing to sell his share was bound first to offer the property to another co-sharer before he could sell it to a stranger. The sole question in the case was whether or not the plaintiff pre-emptor had refused to purchase the property when offered to him. The court of first instance disbelieved the evidence adduced by the vendees on the subject of the plaintiff's refusal to purchase and decreed the suit. The defendants vendees appealed to the High Court.

Mr. A. H. C. Hamilton (the Hon'ble Dr. Tej Bahadur Sapru and Babu Piari Lal Banerji with him), for the appellants.

Mr T. N. Chadha (with him, Munshi Giridhari Lal Agarwala), for the respondents.

RICHARDS, C. J., and TUDBALL, J. :—This appeal arises out of a suit for pre-emption and was before us on a previous occasion. We held that the plaintiff, under the circumstances of the case, was entitled to get the property by pre-emption provided that he had not refused to purchase it. The court below has decided that the plaintiff did not refuse to purchase. The court disbelieves the evidence adduced by the vendees upon this point, and it is to be remembered that, although the plea was raised when the case came on originally for trial, it was not until after the order for remand that evidence of refusal to purchase was given. We see no reason to differ from the court below upon the issue of the refusal to purchase. The learned Subordinate Judge in the course of his judgment held that even if the plaintiff had refused to purchase that would not be sufficient to debar him from his right of pre-emption, and has cited two cases, namely, *Munawar Husain v. Khadim Ali* (3) and *Kanhari Lal v. Kalka Prasad* (4). In the last mentioned case there is the following passage in the judgment:—‘As we pointed out in our judgment in *Sohan Lal v. Shahab-ud-din Khan* (5), in order to debar a party

(1) (1917) I. L. R., 89 All., 127. (3) (1908) 5 A. L. J., 331.

(2) (1910) 15 A. L. J., 315. (4) (1905) I. L. R., 27 All., 670.

(5) S. A. No. 909 of 1901, unreported

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PIARI DAT.

entitled to pre-empt a sale from exercising his right an opportunity to purchase must be given, when a definite agreement to purchase at a fixed price has been entered into with a stranger. It is not enough to offer property to a person entitled to pre-empt before an agreement to purchase has been entered into with a third party as was the case here." This Bench has had occasion to deal with this *dictum* in several cases, see *Naunihal Singh v. Ram Ratan* (1) and *Nathi Lal v. Dhani Ram* (2). As a general rule the custom, as evidenced by the record in the *wajib-ul-arz*, is that where a co sharer wishes to sell, he must *first* offer it to his co sharer, and if the co-sharer refuses to purchase, he is entitled to go to a stranger. Where the custom proved is of this nature we have no hesitation in saying that if the co-sharer offers the property to another co sharer and he refuses to purchase upon the ground that he has no money or is unwilling for any other reason to purchase, the owner of the property is quite entitled to go and sell it to a stranger and that he is not obliged after he has made a definite agreement with the stranger to return and offer the property to the co-sharer a second time. It seems to us that (where the custom is as stated) the going to a stranger and making a bargain with him before offering it to the co-sharer would be acting contrary to the custom. We dismiss the appeal with costs.

Appeal dismissed.

1918
July, 15.

Before M. Justice Tudball and Mr Justice Abdul Raoof.

BALWANT SINGH (JUDGMENT-DEBTOR) v. JOTI PRASAD AND OTHERS
(DECREE-HOLDERS) *

Act No IV of 1882 (Transfer of Property Act), section 6 (a)—Hindu law—Adoption by widow—Postponement of adopted son's estate during the widow's life—Transfer made by adopted son of property forming part of the estate in the widow's life-time—Spes successionis.

An agreement depriving an adopted son of his right to take possession of the property of his adoptive father is not prohibited by law. *Kali Das v. Bijai Shanka* (3) and *Visalakshi Ammal v. Sivaramian* (4) referred to.

Where such an agreement has been entered into, for example, an agreement giving a life estate to the adoptive mother and the remainder to the adopted

* First Appeal No. 160 of 1918, from a decree of Raghunath Prasad, Subordinate Judge of Saharanpur, dated the 5th of April, 1918.

(1) (1916) I. L. R. 39 All., 127.

(3) (1891) I. L. R., 13 All., 391.

(2) (1917) 16 A. L. J., 315.

(4) (1904) I. L. R., 27 Mad., 577.

son, the interest of the son is not merely that of a contingent collateral Hindu reversioner, but he has vested interest in the property of his adoptive father which he is competent to deal with, subject only to the previous life estate. He is not barred by the provisions of section 6 (a) of the Transfer of Property Act, 1882, from dealing with the property.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Nihal Chand*, for the appellant.

Mr. *B. E. O'Connor* and *Munshi Lakshmi Narain*, for the respondents.

TUDBALL and ABDUL RAOOF, JJ :—This appeal arises out of an execution proceeding under two decrees dated (1) the 22nd of June, 1917, and (2) the 15th of December, 1917, both of which were passed in one and the same suit No. 63 of 1915, (1) *Rai Bahadur Lala Joti Prasad*, (2) *Lala Raghunath Singh*, and (3) *Lala Beni Prasad*, plaintiffs, versus (1) *Chaudhri Balwant Singh*, (2) *Rana Indar Singh*, defendants. The application for execution was made on the 17th of December, 1917, and the prayer made was that possession over taluqa Naogaon, entered in the list annexed to the application, be delivered to the decree-holders against the judgment-debtors Nos. 1 and 2. A further prayer was that the Collector of Saharanpur, who was in possession of the property as a receiver, be asked by a rubkar to deliver possession of the said property to the decree-holders and to hand over to them such sums of money as may be with him in deposit, on account of the profits of the said property. Objections were raised by Balwant Singh, judgment-debtor, to the execution of the decree. Those objections have been disallowed by the learned Subordinate Judge of Saharanpur by his judgement, dated the 5th of April, 1918. Chaudhri Balwant Singh, judgment-debtor, has appealed and in the memorandum of appeal has raised pleas embracing almost all the objections which he had raised in the court below. In order to appreciate the pleas raised and the argument addressed to the Court on behalf of the appellant it is necessary to state shortly the previous history of the litigation.

One Raja Raghubir Singh was the owner of a considerable property known as the Landhaura Estate. He died in the year 1868, leaving Rani Dharam Kunwar, who was pregnant at the time, as his widow. It is an admitted fact that before his death he

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permitted and authorized his widow to adopt a son for him, in case the child born of the widow died in its infancy. He further gave permission to adopt another son in case the one adopted were to die in his childhood, in her life-time.

A child was born after the death of Raghubar Singh, but he having died, Rani Dharam Kunwar adopted one Indar Singh, in 1877. The latter having died, she adopted one Ram Badan Singh in 1883, who also having died in 1885, one Bharat Singh was selected in 1893, for adoption, but before his adoption had taken place, he died in 1896. Eventually Chaudhri Balwant Singh, the appellant in this appeal, was adopted on the 13th of January, 1899, and a deed of adoption was executed on that date and was formally registered. The material portions of the said deed having a bearing upon the questions in dispute in this appeal are these.—

In paragraph 3 it is stated that on the death of the Raja, Rani Dharam Kunwar entered into proprietary possession of all kinds of property (در قسم متروکہ کی مالک و مستحق و قابض ہوئی) and that she was in possession of all the property belonging to the riyasat of the said Raja Sahib at the time of the execution of the document. In paragraph 4 it is stated that being the owner of a considerable property, the Raja in his life-time, owing to religious needs and other requirements, was anxious to have a son born who might fulfil the religious needs and who might be the owner of the riyasat. In paragraph 5 it is stated that as the lady, at the time of his last illness, was pregnant, he did not adopt a son himself in his life-time. In paragraph 6 it is stated that during his last illness, having suddenly become hopeless of his life he, by way of precaution, directed the lady: "That in case a daughter is born or if a boy having born dies, I enjoin upon you and order you that you should adopt a boy for me, so that he may keep our name alive and after your death may be the absolute owner and possessor of my entire estate and if perchance, the son adopted, according to this permission, dies in your life-time then you will continue to have the power of further adoption." In paragraph 10, it is stated that she in June, 1898, selected Chaudhri Balwant Singh, son of Chaudhri Ram Nawaz, for the purpose of adoption and from that date the

said Balwant Singh came under her protection and was brought up by her. In paragraph 11 it is stated that the executant adopted Chaudhri Balwant Singh on the 13th of January, 1899. In paragraph 12 it is stated that: "The said Balwant Singh will be considered the adopted son of Raja Raghubir Singh and of the executant and he will perform all the religious duties towards the said Raja Sahib and the executant after the death of the executant and after her death he will be the absolute owner of the property of the riyasat Landhaura. The most important provision is contained in paragraph 13, which runs thus :—

"That during her life-time [the executant will continue to have all the rights over all the properties of the riyasat of Landhaura left by Raja Raghubir Singh, which a Hindu widow has over her husband's estate according to the Hindu law and that she will continue to be the owner and in possession as before, that the said Balwant Singh, my adopted son, will have no right to interfere with my rights of ownership and with the management and supervision of the riyasat during my life. But the said adopted boy will be maintained according to his position and status and he will be properly brought up, and that she has adopted Balwant Singh on these conditions and Chaudhri Ramnawaz, the father of Balwant Singh, has given him in adoption on these very conditions and this was in accordance with the wish and permission of the Raja Sahib . . . " On the same date Chaudhri Ramnawaz Singh executed an *igrarnama*, in which, after mentioning that he had willingly given his son Chaudhri Balwant Singh, aged 16 years, in adoption, to Rani Dharam Kunwar, he stated "that from this date the son ceases to have any connection with his natural family and that the said son will, from to-day, acquire all the rights which an adopted son has under the law in all the property left (*مترک*) by Raja Raghubir Singh deceased and which are in the possession of the Rani Sahiba. But it has been agreed between me and Rani Sahiba that according to the wish and permission of Raja Raghubir Singh the Rani Sahiba will continue to be مالک اور نائب (owner and in possession) of the entire riyasat during her life "

Disputes having arisen between Chaudhri Balwant Singh and his adoptive mother, Rani Dharam Kunwar, the latter instituted

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a suit against him in 1905, with the object of getting rid of him. It is unnecessary to give the details of that litigation; it is enough to state that the suit was dismissed and Chaudhri Balwant Singh was successful. His position as the adopted son of Raja Raghubir Singh was made secure.

In 1911, Chaudhri Balwant Singh filed a suit (No. 1 of 1911) against the Rani Dharam Kunwar for possession of the properties of the riyasat Landhaura, but the defendant having died during the course of the suit, in the month of November, 1912, the further prosecution of the suit became unnecessary.

During the course of the litigation with Rani Dharam Kunwar Balwant Singh had to mortgage and sell portions of the property of the riyasat in order to procure funds to carry on the fight with his adoptive mother. The property, the subject-matter of the present dispute, viz, Mauza Ahmadpur Naogaon was sold to the present respondents, (1) Lala Joti Prasad, (2) Lala Raghunath Singh and (3) Lala Beni Prasad, sons of Lala Bansi Lal, under a sale deed, dated the 3rd of March, 1911.

After selling the property in dispute to the respondents, Balwant Singh leased the property by a deed of lease, dated the 2nd of August, 1913, to Rana Dharam Singh, the father of Indar Singh, the judgment-debtor No. 2.

In 1914, Chaudhri Balwant Singh filed a suit No. 61 of 1914, against the present decree-holders in which he assailed the sale deed, dated the 3rd of March, 1911, in favour of the respondents, on the ground of fraud, want of consideration, etc., and prayed that it be set aside. That suit was referred to arbitration on the 17th of September, 1914, and when the award was filed in court certain objections were taken to its validity, but eventually a decree was passed on the award on the 3rd of February, 1915, against Balwant Singh whose suit was dismissed on that date. In pursuance of the decree passed on the award, the present respondent decree holders deposited Rs. 65,000 in court to be paid to Balwant Singh. Against this decree, Chaudhri Balwant Singh filed an appeal in the High Court which was registered as F. A No. 121 of 1915. In the mean time the present respondents filed a suit No. 63 of 1915 in the court of the Subordinate Judge of Saharanpur against Chaudhri Balwant Singh, in which they impleaded

Rana Dharam Singh, the lessee of the property in dispute under the lease, dated the 2nd of August, 1913. Subsequently the name of Rana Indar Singh, his minor son, was added to in the array of defendants, under the guardianship of Musammât Sukhdevi, the grandmother of Rana Indar Singh.

The reliefs claimed in the plaint were (a) that the lease dated the 2nd of August, 1913, be declared invalid and possession be delivered to the plaintiffs as against the defendants 1 and 2, (b) that mesne profits be awarded against the defendants, (c) that a sum of money by way of damages for the price of trees cut down by the defendants be awarded against them.

In addition to F. A. No. 121 of 1915, Chaudhri Balwant Singh, appellant, *versus* Rai Bahadur Lala Joti Prasad and others, two other matters between the parties were pending in the High Court, *viz.*, F. A. No. 123 of 1915 and Civil Revision No. 2 of 1917, and, as mentioned above, the original suit No. 63 of 1915, Rai Bahadur Joti Prasad and others, plaintiffs, *versus* Chaudhri Balwant Singh and Rana Indar Singh, defendants, was pending in the court of the Subordinate Judge of Saharanpur. The respondents in this case and Chaudhri Balwant Singh filed a compromise in the High Court by which they settled all their disputes. Two paragraphs of this compromise, which have a material bearing upon the present proceedings, were these:—

“(1) That if Balwant Singh pay on or before 19th September, 1917, in the court of the Subordinate Judge of Saharanpur for payment to Rai Joti Prasad and others aforesaid the following sums *viz.*—

- (a) Rs. 2,50,000 with simple interest thereon at the rate of 6 per cent. per annum from 18th January, 1915, up to the date of payment;
- (b) Rs. 65,000 with simple interest thereon at 6 per cent. per annum from 17th March, 1915, up to the date of payment;
- (c) the amount due under decree No. 51 of 1915, with interest, as provided in the said decree up to the date of payment, the said Rai Bahadur Lala Joti Prasad, Lala Raghunath Singh and Lala Beni Prasad shall and do hereby abandon all claim and interest under the sale of

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March, 1911, and their suit for possession of the taluqa Naogaon shall stand dismissed, parties bearing their own costs throughout the litigation, and the Collector of Saharanpur as the receiver of the property shall deliver Naogaon to Chaudhri Balwant Singh together with all profits in his hands.

(2) That if the said Chaudhri Balwant Singh does not pay into court the amount aforesaid in terms of the preceding clause on or before the 19th of September, 1917, his suit and F. A. No. 121 of 1915, F. A. F. O. No. 123 and Civil Revision No. 2 of 1917 shall stand dismissed, both parties paying their own costs, and the original suit No. 63 of 1915 shall stand decreed with costs and the Collector of Saharanpur, who is in possession of Naogaon as receiver appointed by the court, shall deliver possession of the said taluqa together with profits thereof in his hands to Rai Bahadur Lala Joti Prasad and others, plaintiffs in that case." It was further stated in the compromise that, "this compromise is filed in the three cases pending in this Hon'ble Court and the parties will file a copy of this compromise in suit No. 63 of 1915, within one week from this date, and apply to the said court to decree the claim in accordance therewith." It appears that a copy of this compromise was filed in the court of the Subordinate Judge of Saharanpur, in which the suit No. 63 of 1915 was pending, and the learned Subordinate Judge was requested to pass a decree in the suit in accordance with the terms of the compromise. No objection was raised on behalf of Balwant Singh, but Rana Indar Singh objected, that, as he was not a party to the compromise, a decree could not be passed as against him on the compromise, and that as separate decrees could not be passed against the two defendants no decree should be passed even against Balwant Singh. The learned Subordinate Judge, however, over-ruled the objections of Indar Singh and passed a decree against Balwant Singh on the basis of the compromise on the 22nd of June, 1917, ordering that a copy of the above mentioned compromise be attached to the decree.

Subsequently a compromise was also effected between the plaintiffs Rai Bahadur Lala Joti Prasad, etc., and Rana Indar Singh, under the guardianship of Rani Sukhdevi, his grandmother,

and under the terms of the compromise a decree was passed by the Additional Subordinate Judge of Saharanpur in the suit, against defendant No. 2 also, on the 15th of December, 1917. Chaudhri Balwant Singh did not deposit the amount which he was required to do, on or before the 19th of September, 1917, under the compromise. The necessary result of this was that the suit of Balwant Singh No. 61 of 1914 stood dismissed, and suit No. 63 of 1915 of the plaintiffs against Balwant Singh and Indar Singh stood decreed. Hence this application for execution of the two decrees passed in the suit No. 63 of 1915 was made and the court was asked to deliver possession to the plaintiffs, decree-holders over taluqa Naogaon. The judgment-debtor No. 1 objected to the execution of the decree on the grounds—

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(1) That at the time of the execution of the sale-deed, on the basis of which the decree under execution had been obtained, the objector had merely a chance of succession after the death of Rani Dharam Kunwar, which could not be transferred under the law, and, having regard to the provisions of section 6 (a) of the Transfer of Property Act, no right vested in the transferees under the sale.

(2) That, the transfer being contrary to law, the compromise between the parties, and the subsequent decree passed on the compromise could not validate the transfer.

(3) That the compromise ought not to have been accepted and a decree ought not to have been passed on its basis under order XXIII, rule 3, of the Code of Civil Procedure.

(4) That as the compromise was not filed in court within a week, as provided by the compromise, a decree ought not to have been passed on it. On behalf of the decree-holders it was urged that the provisions of section 6 (a) of the Transfer of Property Act were not applicable to the facts of this case.

(5) That the decrees passed in the suit No. 61 of 1914 and 63 of 1915 operated as *res judicata*.

(6) That the judgment-debtor in his suit No. 61 of 1914 himself, had accepted the award in spite of an objection by the decree-holders, and that he had benefited under the award by receiving Rs. 65,000 under it, and that he was now estopped from objecting to the award and the compromise.

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The learned Subordinate Judge of Saharanpur decided that the case of an adopted son, where the adoption was made by a widow on the condition that the adopted son would have no right during her life to the ownership or possession of the property, was distinguishable from the case of a mere Hindu reversioner, who is to succeed after the death of a widow. In his opinion, in spite of a condition postponing the rights of an adopted son, till after the death of the widow, the adopted son would have a vested interest in the property left by the deceased owner. In this view, apparently, he did not think it necessary to deal with the question of estoppel and *res judicata* raised in the pleadings. He was of opinion that the interest acquired by Balwant Singh, being of a higher character than the mere contingent reversionary interest of a collateral to succeed to property on the death of a Hindu widow, he was capable of dealing with it effectively, though the operation of the transfer made by him may be postponed till after the death of the widow. He based his judgment on the general principles of the Hindu law and disallowed the objections raised by the judgment-debtor. Towards the end of his judgment there is an indication that he was also of opinion that the objection now raised by the judgment-debtor ought to have been raised by him at the time the compromise was filed and before a decree was passed on it. The pleas raised in the memorandum of appeal presented to this Court raise two main questions :—

(1) Whether the transfer made by Balwant Singh was ineffective as being opposed to the provisions of section 6 (a) of the Transfer of Property Act? and

(2) Whether the subsequent compromise effected in the suits Nos. 61 of 1914 and 63 of 1915 had the effect of removing any defect existing in the sale? Only these questions were argued before us.

In order to determine the first question, we think it necessary first to examine the provisions of the deed of adoption together with those of the agreement executed by the natural father of Balwant Singh. In doing this, we ought to keep in mind the general rules of the Hindu law as applicable to an adoption. The adopted son on his adoption leaves his father's *Gotra* and

cannot take his estate, nor does he offer *pindas* to him. As soon as the adoption is made, he is transferred to the family of the adoptive father. He stands exactly in the same position as if he had been born to his adoptive father. He divests the estate of any person in possession of the property of the adoptive father. If a widow happens to be in possession of the estate, the result of the adoption is that her limited estate at once ceases. He becomes the full owner of the property and the widow's rights are reduced to a mere claim of maintenance. Such being the law, it lies upon the judgment-debtor to establish beyond doubt that the deed of adoption contained such valid conditions as to prevent the operation of the law. He will have, in the first instance, to show that there was an intention to prevent the vesting of the right to property in the adopted son, and that that intention was given effect to by some legal and valid provision in the deed of adoption. On a consideration of the terms of that deed we find that there is nothing in it which would prevent the vesting of the right in the adopted son. It is provided in the deed that the son would leave the family of his natural father and would live with his adoptive mother. He would be brought up under her guardianship and would be supported and maintained according to his position and status, مرتبہ اور حیثیت کے موافق This would show that Balwant Singh was to be treated as an adopted son and his position and status was to be maintained as such. In his view, the condition reserving to the widow the right of ownership and possession during her life-time would simply mean that though Balwant Singh was to be the rightful owner as an adopted son, the widow was to remain in possession during her life, exercising all the powers of ownership, as an ordinary Hindu widow. This construction, to a large extent, derives support from the clear wording of the agreement executed by Ramnawaz Singh, the natural father of Balwant Singh,

”تاریخ امروزہ سے پسر مسطور کا اپنے خاندان سے کچھ تعلق نہیں رہا
 ہی اور پسر مذکور کو وہ حقوق جو قانوناً پسر مہینے کو حاصل ہوتے ہیں
 آج کی تاریخ سے کل جائداد و مدروکہ راجہ رگھویر سنگھ صاحب مرحوم و
 مقبوضہ جنابہ رانی صاحبہ موصوفہ میں حاصل ہونگے۔ لیکن یہ شرط
 مابین منمقر اور جنابہ رانی صاحبہ موصوفہ حسب منشاء وصیت و اجازت

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راجہ دگھیر سنگھ صاحب مرحوم قرار پائی ہی کہ جنابہ رانی صاحبہ
موصوفہ اپنی زندگی تک بدستور مالک اور فاضل کل ریاست رہیں گی
viz., "From this date the son ceases to have any connection
with his natural family and that the said son will, from to day,
acquire all the rights which an adopted son has under the law in
all the property left (مترکہ) by Raja Raghubir Singh deceased,
and which are in the possession of Rani Sahiba. But it has been
agreed between me and Rani Sahiba that according to the wish
and permission of Raja Raghubir Singh, the Rani Sahiba will
continue to be مالک اور فاضل (owner and in possession) of the
entire riyasat during her life."

In this view of the construction of the deed of adoption it becomes unnecessary to consider the question whether it is lawful for a Hindu widow to make a conditional adoption so as to prevent the adopted son from taking possession of, and enjoying rights of ownership over, the property of the adoptive father during her life, and whether such a condition creates an interest in favour of an adopted son, of the nature which is contemplated by clause (a), section 6 of the Transfer of Property Act.

It has been held in several cases that an agreement depriving an adopted son of his right to take possession of the property of the adoptive father is not prohibited by the law and such an agreement has been given effect to. See, for example *Kali Das v. Bijar Shankar* (1), and *Visalakshi Ammal v. Sivaramien* (2). But we have not been referred to any case in which it has been held that the interest of an adopted son under such a conditional adoption is exactly similar to the interest of a contingent collateral Hindu reversioner. The latter kind of interest has been held to be a mere chance of an heir apparent succeeding to an estate, and as such has been held to be non-transferable. Irrespective of the construction which we have put on the terms of the deed of adoption, we are of opinion that it has not been shown that the interest created in favour of Chaudhri Balwant Singh under the conditional adoption in question was a mere possibility of succession to the Landhaura Estate after the death of Bani Dharam Kunwar. In our opinion, both according to the

(1) (1891) I L. R., 13 All., 491

2) (1904) I L. R., 27 Mad., 577.

interpretation of the deed of adoption and the law, a vested right was created in his favour, and merely his right of enjoyment and possession was postponed till after the death of the lady. Such being the case, we are of opinion that the transfer of taluqa Nao-gaon in favour of the decree-holders under the sale deed, dated the 3rd of March, 1911, was unaffected by the provisions of section 6 (a) of the Transfer of Property Act.

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We agree with the lower court that on this finding alone the objections of the judgment-debtor were bound to fail, but we are also of opinion that the subsequent compromise and the decrees passed thereon left no room for any contention on the point. Ram Dharam Kunwar having died in November, 1912, the property vested in Chaulhri Balwant Singh. He was at the time a married man, 29 years old, and could deal with it as he liked. Under the compromise he entered into a new agreement according to which the property sold was to vest in the decree-holders in the event of his failing to pay to them certain sums of money before the 19th of September, 1917. The parties understood their positions fully and by a lawful agreement completed a binding contract. A decree was passed on the compromise which put an end to all disputes between the parties. It is too late now to try to go behind the compromise and the decree. It has, however, been argued on behalf of the appellant that if it was a mere expectancy that was transferred by the sale deed in question it was open to him to impugn both the compromise and the decree when possession was claimed in execution. In support of his contention the learned counsel, for the appellant, relied upon the case of *Ramasami Naik v. Ramasami Chetti* (1). That was a case relating to an impartible and inalienable zamindari. The nature of the interest which was transferred in that case by mortgage and the circumstances under which the consent decree had been obtained are stated at p. 261 of the report in these words :—

“We now come to the most serious objection urged by the appellant. It is said that by the suit mortgage and the consent decree the second to the fifth defendants purport to transfer only their chance of succeeding to the zamindari, and that such a

(1) (1907) I. L. R., 30 Mad., 255.

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chance or mere possibility is incapable of transfer in India by virtue of section 6 (a) of Transfer of Property Act. As pointed out by MURTHUSAMI AYYAR, J. [*Sivasubramania Naicker v. Krishnammal* (1)] in the case of this zamindari the interest to which each zamindar succeeds is his separate property and consists of his right to the income of the zamindari as beneficial owner for life. This is the interest which defendants Nos. 2 to 5 have sought to transfer by the mortgage and the consent decree. At the dates of mortgage and decree they had a mere chance of succeeding to this interest dependent in the case of each on his surviving all the male members of the family older than himself so as to make him for the time being the oldest member."

At the bottom of page 262 the learned Judges who decided the case remarked:—

"It is further urged that the defendants cannot go behind the decree. If, however, the mortgage did not operate as a transfer of interests of defendants 2 to 5, neither could the consent decree in the circumstances of the present case."

Now, what were the circumstances to which the learned Judges referred? The circumstances were these:—

The only interest which the defendants 2 to 5 in that case had was a mere chance of succeeding to a life interest on the happening of certain event as described at page 261, above mentioned. In that case there can be no doubt that the interest transferred was of a kind contemplated by section 6, clause (a), of Transfer of Property Act. The mortgage was made of such interest and *at the time the consent decree was passed it was still a mere chance*. In the present case, irrespective of the nature of interest which Chaudhri Balwant Singh possessed at the time of the sale deed, he had a full and complete interest which had come into existence before the compromise and the consent decree. If the widow had been alive at the date of the consent decree in that case the ruling might have had a bearing on this question. No case has been cited having a direct bearing upon the facts of the present case. In our opinion it is not open to the judgment-debtor to go behind the compromise and consent decree in this case.

(1) (1894) I. L. R., 18 M. d., 287 (291).

Over and above all that we have mentioned above, there is the fact that what Chaudhri Balwant Singh purported to transfer both by the deed of sale and the compromise was not a mere expectancy, but the full right of ownership. Even assuming that he had no vested interest at the date of sale, he subsequently became the full owner and was such at the date of the compromise. He had received the sale consideration and the respondents had also paid a further sum of Rs. 65,000 and they are entitled to the estate which subsequently became vested in Chaudhri Balwant Singh after the death of the Rani. At the date of the sale, Chaudhri Balwant Singh claimed to be the full owner and was actually suing the Rani for possession and he purported to transfer the full right. We think that the decision of the court below is right and that the appeal should be, and it is hereby, dismissed with costs.

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Appeal dismissed.

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ACTS—1859—XIII (WORKMEN'S BREACH OF CONTRACT ACT)—Scope of the Act—Act applicable not merely to fraudulent breaches of contract.] The provisions of Act No XIII of 1859 are not applicable merely to fraudulent breaches of contract, but can and must be enforced in respect of any breach of a contract within the scope of the Act. *Emperor v Bakhtawar*, I L. R., 40 All., 282, followed.

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SECTION 2—Advance given by employe on agreement by workman to work for him for a certain specified period—Breach of agreement.] A workman living in Cawnpore took an advance of Rs. 10 from his employer and entered into an agreement to work for him for ten months on the understanding that one rupee was to be deducted from his wages each month. *Held*, that such a contract contained nothing repugnant to Act No XIII of 1859 and was capable of being enforced under the provisions of sections 2 and 3 of that Act. *Lucas v Ramar Singh*, Criminal Revision No. 230 of 1910, decided on the 21st of July, 1910, followed.

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—1860—XLV (INDIAN PENAL CODE), SECTION 97, See Act No I of 1872, section 105

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SECTION 120B—Criminal Procedure Code, section 196A—Conspiracy—Authority for prosecution for conspiracy—Complaint.] Section 196A of the Criminal Procedure Code provides that no Court shall take cognizance of the offence of criminal conspiracy punishable under section 120B of the Indian Penal Code 'in a case where the object of the conspiracy is to commit any non-cognizable offence, or a cognizable offence not punishable with death, transportation or rigorous imprisonment, for a term of two years or upwards unless the Local Government or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the Local Government has, by order in writing, consented to the initiation of the proceedings.' *Held*, that the words "not punishable with death, etc.," relate only to the term "cognizable offence."

Three persons presented a petition to the Magistrate and Collector of a district stating that a tahsildar was guilty of various offences under the Indian Penal Code, the principal offence being one under section 161.

The Magistrate treated the petition as a complaint; took the evidence of the person presenting it, and finally dismissed it under section 203 of the Code of Criminal Procedure and gave sanction for the prosecution of the persons responsible for the petition. *Held*, that the Magistrate's procedure was not open to objection.

Emperor v. Thakur Das

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SECTION 173—Summons—Refusal to receive summons when tendered no offence.] Under the Code of Criminal Procedure the mere tender to a person of a summons is sufficient, and a refusal by him to receive it does not constitute the offence of intentionally preventing service thereof on himself under section 173 of the Indian Penal Code.

Emperor v. Bahadur Rai

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ACTS—1860—XLV (INDIAN PENAL CODE), SECTION 192—“*Fabricating false evidence*”—*Document helping court to form a correct opinion*] Certain cattle were sold in a market on the 21st of March, 1917. A clerk, whose duty it was to register sales of cattle held at that market and give receipts to the purchaser, gave a receipt on the 27th March, most probably, and dated it the 27th March, 1917, but subsequently altered the date to the 21st, the actual date of sale.

Held, that there was no case of fabricating false evidence for the alteration of the date was not intended to lead anyone to form an erroneous opinion touching the date of sale, but the contrary.

Emperor v. Badli Prasad

SECTION 266—*Possession of false measure—Intent—Acquittal Criminal Procedure Code, section 438—Practice*] It being in evidence that in the village where accused carried on the business of a cloth-seller the usual standard of measurement was 35½ inches, it was *held* that a conviction under section 266 of the Indian Penal Code in respect of the possession of such a measure of length could not be sustained.

Held, also that the High Court will not as a rule entertain a reference by a Sessions Judge having for its object the reversal of an acquittal, when the Government has right of appeal, more particularly when the matter is one such as a question of correct weights and measures, in which the Government may be considered to be peculiarly interested.

Emperor v. Harak Chand Malwari

SECTION 302—*Murder—Forsaking by arsenic—Intention—Knowledge*] A person who administers a well known poison like arsenic to another must be taken to know that his act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and if death ensue, he is guilty of murder, notwithstanding that his intention may not have been to cause death. *Queen Empress v. Tulsha*, 1 L. R., 20 All., 143, *King-Emperor v. Bhagwan Din*, 1 L. R., 20 All., 268, and *King-Emperor v. Gurali*, 1 L. R., 31 All., 148, referred to.

Emperor v. Gauri Shankar

SECTIONS 304 AND 325—*Assault committed by three persons armed with lathis—Intention—Culpable homicide—Grievous hurt*] Three persons attacked a fourth with lathis and death ensued through a fracture of the skull of the person so attacked. There was, however, no evidence to show that the common intention of the assailants was to cause death, or which of them actually struck the blow which fractured the skull of the deceased.

Held, that the offence of which the assailants were guilty was that of causing grievous hurt and not that of culpable homicide not amounting to murder. *Emperor v. Bhola Singh*, 1 L. R., 29 All., 282, followed.

Emperor v. Chandan Singh

SECTIONS 325, 300, EXCEPTION 4—*Grievous hurt—Murder—Culpable homicide not amounting to murder—Fatal assault committed by three persons acting in concert*] A dispute having suddenly arisen concerning the cutting of a sugarcane crop, three men armed with lathis attacked one of the men who was engaged in cutting the crop and beat him so severely that he died, his skull being broken in three places. A nephew of the man attacked, having his lathi with him, attempted to rescue his uncle, and also received considerable injuries.

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Held, that the offence of which the assailants were guilty was not the mere causing of grievous hurt, but culpable homicide, which, however, might in the circumstances, be considered as not amounting to murder by the application of exception 4 of section 300 of the Indian Penal Code. *Empeo v Chandan Singh*, 1 L. R., 40 All, 103, dissented from *King-Empero v Hanuman*, 1 L. R., 35 All, 560, and *Empeo v. Ram Nawaz*, 1 L. R., 35 All, 503, referred to.

Emperor v. Gulab 636

ACTS—1800—XLV (INDIAN PENAL CODE), SECTIONS 322, 323—*Criminal Procedure Code, section 144—Public servant in the execution of his duty as such—Police constable assaulted whilst attempting to enforce an order which in fact had become obsolete*.] A police constable was assaulted whilst endeavouring to enforce an order passed by the District Magistrate as to the curbing of lathis by Pragswals, which order, if originally lawful, had in any case become obsolete.

Held, that in the circumstances the persons who assaulted the constable could not be convicted under section 322 of the Indian Penal Code, but they were liable to conviction under section 323. *Queen-Empress v. Dalup*, 1 L. R., 18 All, 243, referred to

Emperor v. Madho

SECTIONS 366, 368—*Kidnaping—Lawful guardianship*.] A Jit girl under the age of 16 years was sent by her father to carry food to the bullocks. She never returned home. Shortly afterwards she was found in a village not far from her home in the company of two men of the same caste. She was then dressed in boy's clothes and had her hair cut short. The two men offered no explanation as to how the girl came to be with them or why she was disguised.

Held, that both the men in whose custody the girl was found were properly convicted under section 366 of the Indian Penal Code. *Empero v. Jetha Nathoo*, 6 Bom L. R., 785, followed.

Emperor v. Harkesh 507

SECTIONS 403 AND 22—*Criminal misappropriation of Movable property*—*Letter addressed to one person retained by another*.] A letter addressed to W was handed by a postman to W, who was at the time in a room in the occupation of H. W. read the letter, and put it on a table in the room and left it there. H. took the letter and subsequently attempted to file it as an exhibit attached to an affidavit made by him in a suit for judicial separation between W and his wife, for the purpose, as he afterwards stated, "of strengthening Mrs. W's case and of improving his own position." The Court however, refused to receive the letter. *Held*, that in the circumstances H. could not be convicted of dishonest misappropriation of property with respect to his retention of the letter. *Quære* whether the letter could be regarded as "movable property" within the meaning of section 22 of the Indian Penal Code.

Emperor v. Harris 119

SECTION 408—*Embezzlement as a clerk or servant—Misfeasance of charges*.] A station master on the East Indian Railway, under an arrangement with the Company, received a fixed allowance in respect of the marking, loading and unloading work at his station and used to engage his own men for that purpose. One of such men, engaged as a marksman, was first allowed to keep certain registers, which it was the duty of the station master to maintain, and next allowed to receive cash payments and make entries in the cash register. Whilst so employed

he received a sum of Rs. 5-10-0 as an overcharge or demurrage in respect of certain goods which passed through his hands, and appropriated the same. To this sum, however, the Railway Company made no claim. He was also alleged to have received and appropriated to his own use two other sums of money under somewhat similar circumstances. In respect of these three sums he was tried and convicted on three counts under section 408 of the Indian Penal Code.

Held that though, if any, committed with regard to the sum of Rs. 5-10-0 did not fall within section 408 at all, and, this being so, the joinder of the three charges in one trial was illegal.

Emperor v. Kalim-ud-din 565

ACTS—1860—XIV—(INDIAN PENAL CODE), SECTION 441—*Criminal trespass—Necessary constituents of offence*] Where a person is found in the house of another in circumstances which would *prima facie* indicate that the offence of criminal trespass as defined in section 441 of the Indian Penal Code had been committed, and sets up the defence that he did not enter the house with any of the intents referred to in the section, but in pursuance of an intrigue with a female living there, it is the duty of the trying court to give accused an opportunity of substantiating such defence.

If the accused succeeds in showing that his presence in the house was in consequence of an invitation from or by the connivance of a female living in the house with whom he was carrying on an intrigue, and that he desired that his presence there should not be known to the person in possession, then he cannot be convicted of criminal trespass.

If, however, it is shown that the person in possession of the house has expressly prohibited the accused from coming to the house, an intent to annoy may be legitimately inferred.

The following cases were referred to:—*Balrakand Ram v. Ghanasiam*, I. L. R., 22 Cal., 801; *Priemundo Shaha v. Bindabun Chung*, I. L. R., 22 Cal., 944; *Empeo v. Lakshman Raghunath*, I. L. R., 25 Bom., 558; *Empeo v. Mulla*, I. L. R., 27 All., 395; *Empeo v. Ganga Bhar*, I. L. R., 28 All., 517.

Emperor v. Chhote Lal 221

SECTION 494—*Offence triable by Court of Session—Accused discharged—Order directing complainant to pay compensation—Criminal Procedure Code, section 250—Judgment written by magistrate.*] Section 250 of the Code of Criminal Procedure is not applicable where the charge which is being inquired into by a magistrate is one which is exclusively triable by a Court of Session. Neither in such a case is the magistrate empowered to write a judgment, all that he is empowered to do is to record reasons for a discharge, if he make such an order, and to pass the order of discharge. *Fattu v. Fattu*, I. L. R., 26 All., 564, referred to.

Het Ram v. Ganga Sahai 615

Act No. I of 1872, section 132 271

1867—III (PUBLIC GAMBLING ACT), SECTION 13—*Gaming in public place—Seizure of money as well as instruments of gaming illegal.*] Where persons are found gambling in a public place in circumstances to which section 13 of the Gambling Act, 1867, is applicable, although instruments of gambling, etc., may be seized by the police, there is no authority for the confiscation of money found with the persons arrested. *Emperor v. Tota*, I. L. R., 26 All., 270, followed.

Emperor v. Maturwal 517

ACTS—1869—I (ODDH ESTATES ACT), SECTIONS 7, 8, 10, 22, <i>See</i> Hindu law	470
—1870—VII (COURT FEES ACT), SECTION 7 VI <i>Suit for pre-emption—Suit partly decreed and partly dismissed—Appeal arising questions both as to true price and as to right to pre-empt—Court fee</i> Five villages were transferred by means of one sale deed, the consideration set forth in the deed being Rs 44,000. In respect of this transaction a suit for pre-emption was brought, but the plaintiff alleged that the true consideration was Rs 2,500 only. As to two of the villages the suit was decreed, on payment of Rs 21,000, which was found to be the proportionate part of the Rs 44,000 assignable to the villages; as to the other three villages the suit was dismissed. The plaintiff appealed (a) as to the price to be paid for the two villages in respect of which the decree was in his favour and (b) in respect of the disallowance of his claim to pre-empt the other three villages. A question having arisen as to the proper court fee payable on this appeal, it was held that the appeal was divisible into two clear and distinct parts, and that in respect of (a) the appellant should pay an <i>ad valorem</i> fee on the difference between 21/44 of Rs. 2,500 and Rs. 21,000, while in respect of (b) the appellant should pay a court fee calculated according to section 7, vi, of the Court Fees Act, 1870, on five times the Government Revenue of the three villages claimed.	
Abinash Chandra v. Shekhar Chand	353
SECTIONS 19, VIII: 19 I, SCHEDULE I, No. 11, AND SCHEDULE III— <i>Court fee—Computation of duty payable on probate or letters of administration.</i> Held, on a construction of the Court Fees Act, 1870, that no duty is payable in respect of a grant of probate or letters of administration where the value of the estate, after making the deductions specified in annexure B of the third schedule, is less than Rs. 1,000.	
In the goods of Mrs. E. H. W. Meik	279
SCHEDULE I, ARTICLE 1— <i>Court fee—Cross objection filed in appeal</i> Under article 1 of schedule I to the Court Fees Act, 1870, a party filing cross-objections must pay an <i>ad valorem</i> fee according to the value or amount of the subject matter in dispute.	
Lakhan Singh v. Ram Kishan Das	93
SCHEDULE II, ARTICLE 6, SECTION 7, CLAUSE XI— <i>Suit for declaration that plaintiff is an occupancy tenant—Act (Local) No. II of 1901 (Agra Tenancy Act), section 95—Court fee</i> In a suit under section 95 of the Agra Tenancy Act, 1901, to declare the plaintiff's status as an occupancy tenant the plaint or memorandum of appeal should bear a court fee of eight annas as provided in article 6 of schedule II to the Court Fees Act; section 7, clause xi, of the Act does not apply to such a suit.	
Ratan Singh v. Khem Karan	358
—1872—I (INDIAN EVIDENCE ACT), SECTION 68— <i>Admissibility of document in evidence—Mortgage-deed not proved but terms thereof incorporated in a subsequent instrument properly executed and proved</i> Where a document, itself legally inadmissible in evidence, was subsequently referred to and partly incorporated in a second document of similar import duly executed between the same parties and registered according to law, it was held that the earlier document might be referred to for the purpose of explaining and amplifying the terms of the second, and of arriving at a correct conclusion as to the true nature of the transaction into which the parties had entered. <i>Fishmongers' Company v. Dimsdale</i> , 18 L. J., C. P., 65; 6 C. B., 899, and <i>Mitchell v. Mathura Das</i> , 1 L. R., 8 All., 6, referred to.	
Moti Chand v. Laita Prasad	256

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 105—*Act No. XLV of 1860 (Indian Penal Code), section 97—Right of private defence—Pleadings—Alternative and apparently inconsistent pleas.* The right of an accused person to defend himself upon a criminal charge can only be limited by the provisions of the statute law.

There is nothing in the law to prevent a man on his trial on a charge of culpable homicide from setting up an alternative defence on some such lines as these:—"First, I was not present at the occurrence referred to by the prosecution witnesses, and they are giving false evidence against me: secondly, even if I fail to persuade the Court of this fact, I can show, from the statements of the prosecution witnesses themselves, that, if I had caused the death of any person in the manner and under the precise circumstances deposed to by their evidence, I should have been acting in the lawful exercise of a right of private defence."

Queen-Empress v. Prag Dat, I. L. R., 20 All., 459, *Queen-Empress v. Tinnal*, I. L. R., 21 All., 122, and *Emperor v. Gulla*, Weekly Notes, 1904, p. 113, referred to.

Emperor v. Yusuf Husain

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SECTION 132—*Act No. XLV of 1860 (Indian Penal Code), section 499—Witness—How far a statement made by a witness in giving evidence is privileged* [A person who whilst giving evidence as a witness in court has made a statement which *prima facie* amounts to defamation under section 499 of the Indian Penal Code may plead one or other of the exceptions to that section or he may claim the protection of the proviso to section 132 of the Indian Evidence Act, 1872; but in the latter case he must show that he was compelled to make the statement alleged to be defamatory in the sense that he had asked to be excused from answering the question which led up to it and the court had obliged him to answering it. *Queen v. Gopal Dass*, I. L. R., 3 Mad. 271, *Queen-Empress v. Moss*, I. L. R., 16 All., 88, and *Emperor v. Ganga Prasad*, I. L. R., 29 All., 685, referred to.

Kallu v Sital

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1872—IX (INDIAN CONTRACT ACT), SECTION 65—*Minor—Minority successfully pleaded as a defence to a suit—Disallowance of costs—Appeal—Competence of appellate court to interfere with the discretion of the court below as to the allotment of costs* [When the Judge has given his reasons and all the circumstances are before the Court of Appeal, the Court of Appeal can, if satisfied that the Judge's discretion has not been judiciously exercised, interfere with it and make the order which the court below ought to have made.

It is no ground for giving costs against a successful defendant that the defendant pleaded that he was a minor at the time when the transaction upon which the suit was based was entered into, there being nothing to suggest that the plaintiff had been misled as to the real age of the defendant by any action or statement on the part of the latter.

Radhe Shyam v. Behari Lal

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SECTION 70—*Sale—Specified sum left with vendees for payment to mortgagees of property other than the subject of the sale—Interest paid by purchasers in addition to specified sum—Gratuitous payment.* [On the sale of certain immovable property of a large value it was agreed between the parties that a specified portion of the purchase money should, instead of being paid to the vendors directly, be paid on their behalf to a certain mortgagee who held a mortgage over property of the vendors other than the subject of the sale. Owing to a delay in the registration of the sale-deed, which was caused by the action of the vendors,

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the purchasers did not immediately pay the stipulated sum to the mortgagee, and when they did come to tender it, the mortgagee refused to accept it upon the ground that by that time a further sum had fallen due as interest. The purchasers thereupon paid the further amount claimed. Subsequently the vendors sued the purchasers for the balance of the purchase money remaining unpaid, and the purchasers claimed to set off against the unpaid purchase money the sum which they had paid as interest, as above described.

Held, that the purchasers were not entitled to the set-off claimed, as the payment of interest was in excess of the sum stipulated to be paid to the mortgagee and was in the circumstances a purely gratuitous payment.

Sunij Bhan v Hashmi Begum 555

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 176—*Pledge—Sale by pawnee of property pledged—Notice of sale*] The words—“He may sell the things pledged on giving the pawnor reasonable notice of the sale”—as used in section 176 of the Indian Contract Act, 1872, mean that the pawnee must give reasonable notice of his intention to sell: it does not necessarily mean that a sale should be arranged beforehand and that due notice of all details should be given to the pawnor.

Kunj Behari Lal v The Bhargava Commercial Bank,
Jubbulpore.. .. 522

—1872—XV (INDIAN CHRISTIAN MARRIAGE ACT), SECTIONS 3 AND 68—“Persons professing the Christian religion”—*Marriage between two bhangers celebrated according to caste rites by two “Christians”*.] One Maha Ram, whose father was a Christian, but who himself was found not to be a Christian, within the meaning of section 3 of the Indian Christian Marriage Act, 1872, although he had been baptized when an infant and used to attend a Christian school, was married to a *bhang* girl according to the rites of the *bhang* caste. This marriage was conducted by two persons, Bachhan and Mangli, who, although they were apparently Christians within the meaning of the Act, officiated as “*mans*,” or priests of the *bhang* caste. All these persons were convicted—Bachhan and Mangli of the substantive offence defined in section 68 of the Indian Christian Marriage Act, 1872, and Maha Ram of abetment of that offence.

Held, that the conviction could not stand, both because Maha Ram, on the facts appearing in evidence, could not be held to be a Christian within the meaning of section 3 of the Indian Christian Marriage Act, 1872, and also, as *held* by WALSH, J, because the Act in question deals with Christian marriages and Christian marriages only. *Queen-Empress v Paul*, I L R, 20 Mad, 12 *In re Kolandarelu*, I L R, 40 Mad, 1030, and *Muthusami Mudaliar v Masilmani*, I L R, 38 Mad, 842, discussed by WALSH, J.

Emperor v. Maha Ram 393

—1877—I (SPECIFIC RELIEF ACT), SECTION 9—*Suit for recovery of possession of immovable property—Construction of plaint—Suit framed as a suit on title, but also referring to section 9 of the Specific Relief Act, 1877—Practice*.] In a suit for recovery of possession of immovable property, from which the plaintiff alleged that his sub-tenants had been ejected by the defendant, the plaintiff claimed (1) a declaration of his title, (2) possession of the land, and (3) damages for dispossession, and (4) costs. In the body of the plaint it was mentioned that the suit was instituted on 9 of the Specific Relief Act, 1877, and the date the final court fees had not been paid.

At the hearing, the plaint was amended by striking out the claim for a declaration of title, but the claim for damages was retained.

Held, on a construction of the plaint, that the suit was in substance a suit for possession based on title, and should have been tried as such, notwithstanding the reference in the plaint to section 9 of the Specific Relief Act. *Nur Ahmad v. Abid Ali*, 8 A. L. J., 910, referred to

Narain Das v. Het Singh 197

ACTS—1877—XV (INDIAN LIMITATION ACT) SCHEDULE II, ARTICLE 179, *see* Mortgage 407

—1878—VII (INDIAN FOREST ACT), SECTION 25 (1)—*Hunting without a permit in a reserved forest* [Four persons made up a party and went, without having a permit to shoot in a reserved forest. Two of the party shot deer, the two other shot nothing. *Held* that the two members of the party who had not shot anything could properly be convicted of hunting in a reserved forest within the meaning of section 25 (1) of the Indian Forest Act, 1878]

Emperor v. Barkat Ali 38

—1878—XI (INDIAN ARMS ACT), SECTION 19 (f)—*Aims—Fitting as to factum of possession of unlicensed arms—Minor, majority having with his elderly parda-nashin mother—Possession attributed to son* [A parda-nashin lady and her minor son, a young man of some 17 years of age, lived together in the family house. In their house was a small collection of arms of various kinds which had belonged to the father, who, as an honorary magistrate, was exempt from the operation of the Arms Act. There was evidence that the arms were kept clean and that the son at all events took a certain amount of interest in them]

Held that a finding that the son was in possession of these arms, and, not having a licence for them, was liable to conviction for an offence under section 19 (f) of the Indian Arms Act, 1878, was not open to objection.

Emperor v. Ghulam Husain 420

—1879—XVIII (LEGAL PRACTITIONERS ACT), SECTION 36—*Procedure to be followed by a court taking action under section 36—Revision—Statutes 5 and 6 Geo. V Chapter 61 section 107—Difference—Criminal Procedure Code, section 117 (3)* [It is competent to the High Court to entertain an application in revision against an order passed by a District and Sessions Judge under section 36 of the Legal Practitioners Act, 1879, and this without invoking the aid of the Government of India Act, 1915, section 107. *In the matter of the petition of Mudho Ram*, I L. R., 21 All., 181, *In the matter of the petition of Kedar Nath*, I L. R., 31 All. 51, *Babu Sahib v. the District Judge of Madurai*, I. L. R., 24 Mad., 536 and *Hari Chaman Sincar v. the District Judge of Dacca*, 11 C. L. J., 313, referred to]

In a proceeding under section 36 of the Legal Practitioners Act, 1879, the court may properly apply as regards the nature of the evidence admissible, the provisions of section 117 (3) of the Code of Criminal Procedure.

Where a person's name has once been included in a list filed under section 36 the mere fact that the exhibition of such list in any particular court room is discontinued has no effect on the validity of the original order.

In the matter of the petitions of Kalka and others 153

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 6(a)—*Hindu law—Adoption by widow—Postponement of adopted son's estate during the widow's life—Transfer made by adopted son of property forming part of the estate in the widow's life-time—Spes successionis.* An agreement depriving an adopted son of his right to take possession of the property of his adoptive father is not prohibited by law. *Kali Das Bijai v Shankar*, I. L. R., 13 All., 891 and *Visalakshi Ammal v. Sivaramien*, I. L. R., 27 Mad., 577, referred to.

Where such an agreement has been entered into, for example an agreement giving a life estate to the adoptive mother and the remainder to the adopted son, the interest of the son is not merely that of a contingent collateral Hindu reversioner, but he has a vested interest in the property of his adoptive father which he is competent to deal with, subject only to the previous life estate. He is not barred by the provisions of section 6 (a) of the Transfer of Property Act, 1882, from dealing with the property.

Balwant Singh v. Joti Prasad. ..

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SECTIONS 54 AND 118—*Mutual sales of property effected by registered deeds—Subsequent agreement to exchange portions of the property sold—Agreement acted upon, but without execution of written instrument—Legal position of parties.* In 1905, A by means of a duly registered deed, sold property X, with other property to B, and B similarly sold property Y, with other property, to A. Possession of items X and Y was, however, not transferred, and shortly afterwards A and B agreed to exchange the two properties. No deed of exchange was ever executed, but the parties remained in possession of the properties in question from 1905 onwards. In 1915 some of the heirs of B sued to recover property X from A in virtue of the sale deed of 1905. *Held*, that in the circumstances the plaintiffs were not entitled to recover. *Kurri Veeareddi v. Kurri Bapireddi*, I. L. R. 29 Mad. 296, and *Chidambara Chettiar v. Vaidilinga Padayachi*, I. L. R., 38 Mad., 519, dissented from. *Mahomed Musa v. Aghore Kumar Ganguli*, I. L. R., 42 Calc., 801, *Maddison v. Alderson*, 8 A. C., 467, *Sumsudin Ghoolam Husein v. Abdul Husein Kalimuddin*, I. L. R., 31 Bom., 165, *Kavalia Nanubhai Mahomedbhai v. Mansukhrum Yakhalechand*, I. L. R., 24 Bom., 400, *Ram Bakish v. Mughlani Khanam*, I. L. R., 26 All., 266, *Begam v. Muhammad Yakub*, I. L. R., 16 All., 844, *Muhammad Talib Husain v. Inayati Jan*, I. L. R., 33 All., 683, *Jhamplu v. Kuthamani*, I. L. R., 39 All., 696, and *Maung Shwe v. Maung Inn*, I. L. R., 44 Calc., 542, referred to.

Salamat-uz-Zamin Begam v. Masha Allah Khan ..

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See Mortgage ..

SECTIONS 85 AND 89, ..

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1886—XXII (OUDH RENT ACT), SECTION 3(10) AND CHAPTER VIIA—*Enhancement of rent—Lease by taluqdar for collection of rents of a mauza to thekadar—Amendment of Act by United Provinces Act No. IV of 1901 (Oudh Rent Act (1886) Amendment Act)*. Since the addition to the Oudh Rent Act (XXII of 1886) by the amending Act (Oudh Rent Amendment Act, 1901) of chapter VIIA, which deals (*inter alia*) with the enhancement of the rent of land held at a favourable rent, and contains sections 107A to 107K, the specific enactments of chapter VIIA are not limited in their application by section 3, sub-section (10), which must be regarded as a mere glossary defining the terms "tenant" and "thekadar" as those terms are employed in Act XXII of 1886 as it stood when it was passed.

Held, therefore, where the defendant (appellant) was a thekadar or person to whom the collection of the rents of a mauza belonging

to a taluqa had been leased in 1891 by the then taluqdar at a "favourable rate of rent," that the rent was liable to enhancement under chapter VIIA of Act XXII of 1886 in accordance with the provisions, and on the conditions of that chapter, liable to the circumstances of the case.

Farbiti Kunwal v Deputy Commissioner of Khair .. 511
 ACTS—1897—IX (PROVINCIAL SMALL CAUSE COURTS ACT), SECTION 75
See Civil Procedure Code (1908), section 21 .. 525

— SCHEDULE II,

ARTICLE (13)—*Small Cause Court—Jurisdiction—Suit by zamindar to recover a hagg, cess, or due from tenant*] *Held* that a suit by a zamindar to recover from one of his tenants due payable in kind under the provisions of the village *wajib-ul-az* was excluded from the jurisdiction of a Court of Small Cause, by article (1) of the second schedule to the Provincial Small Cause Courts Act, 1887.

Baldeo v Panna Lal 668

— SCHEDULE II,

ARTICLE (31)—*Suit for mesne profits of a grove—Jurisdiction*] *Held* that a suit for recovery of mesne profits of a grove from which the plaintiff had been wrongfully dispossessed is a suit the cognizance of which by a Court of Small Causes is barred by article (31) of schedule II to the Provincial Small Cause Courts Act, 1887. *Prasadi Lal v. Imdad Hussain*, Weekly Notes, 1893, p. 10, distinguished *Shes Bodh v. Surjan*, 11 A. L. J., 218, followed.

Drigpal Singh v. Kunjal 112

ARTICLE (31)—*Small Cause Court—Jurisdiction—Suit by joint owners to recover rent of a house occupied by the other joint owners, — Money had and received—Revision—Objection to jurisdiction not raised in the court below*] *Semle* that a suit by one of two joint owners to recover from the other a share of the rent of a house recovered in the first instance by the defendant with the plaintiff's consent, is a suit for money had and received, and as such within the jurisdiction of a Court of Small Causes.

But in any case, the question of jurisdiction not having been raised in the court below and the case having apparently been correctly decided, the High Court was not bound to interfere in revision. *Ram Lal v. Kabul Singh* I L. R., 25 All, 135, followed.

Sukh Lal v. Nannu Prasad 666

ARTICLE (38)—*Suit relating to maintenance—Jurisdiction*] Plaintiff's father in law left by his will certain property to plaintiff's three brothers-in-law charged with the payment of Rs. 36 per annum to the plaintiff during her life. Subsequently the brothers-in-law agreed amongst themselves to divide their liability for payment of this annuity, so that each became liable individually for the payment of Rs. 12 per annum. *Held* on suit brought by the annuitant to recover arrears of her maintenance allowance against one of her brothers in law that the suit was a "suit relating to maintenance" and that the cognizance thereof by a Court of Small Causes was barred by article (38) of schedule II to the Provincial Small Cause Courts Act, 1887. *Mahadeo Rao v. Deo Narain Rao*, 2 A. L. J., 697, and *Masum Ali v. Mohsen Ali*, Weekly Notes, 1890, p. 201, distinguished.

Munir-ud-din v. Samnunissa Bibi 52

ARTICLE (41)—*Decree for maintenance against three persons, two of whom were made liable only in case of default by the third—Suit*

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- to recover proportionate amount of payments made—Suit cognizable by a Court of Small Causes.*] A decree was passed against three brothers for payment of a maintenance allowance to the widow of a fourth brother deceased. It was, however, provided by the decree that one of the three, Ant Ram, should alone be primarily liable for payment of the allowance, and the others only in case of default being made by Ant Ram. Ant Ram having made certain payments sued to recover a proportionate part thereof from the other brothers. *Held*, that the suit was not one for contribution; but was a suit cognizable by a Court of Small Causes. *Mavula Annmal v. Mavula Maracoi*, I. L. R., 80 Mad., 212, and *Rama-wami Pantulu v. Narayannothu Pantulu*, 14 M. L. J., 480, followed. *Fatima Bibi v. Hanada Bibi*, 13 A. L. J., 452, referred to.
- Ant Ram v. Mithan Lal 195
- ACTS—1887—XII (BENGAL, AGRA AND ASSAM CIVIL COURTS ACT), SECTION 21 (4), *See* Criminal Procedure Code, section 195 .. 21
- 1869—VII (SUCCESSION CERTIFICATE ACT), SECTIONS 7 AND 9—*Certificate of succession—Security—Application by widow of separated Hindu.*] Where, under section 9 of the Succession Certificate Act, 1869, the requiring of security is optional, security should not be taken from the widow of a separated Hindu asking for a certificate to enable her to collect debts due to her husband, in the absence of special circumstances rendering the taking of security necessary
- Narain Dei v. Parmeshwar 81
- 1894—I (LAND ACQUISITION ACT) SECTIONS 23, 49—*Principles of assessment of compensation—Land forming part of compound of house, but actually in possession of tenants with occupancy rights.*] The owner of a house with a compound attached to it let out a large part of the compound to agricultural tenants whom he allowed to acquire occupancy rights therein. *Held*, on a question arising as to the principle of assessing compensation for this portion under the Land Acquisition Act 1894, that so far as the owner's interest was concerned, compensation was properly calculated at so many years' purchase of the annual profits actually received by the owner at the time of the sale. The owner could not, in the circumstances, be allowed to claim compensation as for a building site. *Bombay Improvement Trust v. Jaldhoy Ardeshir*, I. L. R., 23 Bom., 483, referred to.
- Ode v. The Secretary of State for India in Council .. 367
- 1895—XV (CROWN GRANTS ACT), SECTION 2, *See* Hindu law .. 470
- 1899—II—(INDIAN STAMP ACT) SECTIONS 40 AND 57—*Instrument certified by Collector to have been duly stamped—Reference by Chief Controlling Revenue Authority to High Court questioning correctness of Collector's decision—Jurisdiction.*] *Held*, that if a Collector has taken action under section 40, sub-section (1) (b), of the Indian Stamp Act, 1899, and having received the deficient duty and the penalty imposed, has certified under sub-section (1) (a) that the instrument before him is duly stamped, the effect of sub-section (2) is that the jurisdiction of the Chief Controlling Revenue Authority to refer to the High Court, under section 57 of the Act, the question whether such instrument is in fact sufficiently stamped or not is ousted. *Reference under Stamp Act, section 57*, I. L. R., 25 Mad., 752, followed.
- Stamp Reference by Board of Revenue 123
- SECTION 62, SCHEDULE I, ARTICLE 5—*Stamp—Petition to court intimating compromise of suit—Agreement.*] The parties to a suit came to terms out of court, and presented a joint petition to the court stating the terms of compromise arrived at and asking that a consent decree might be given in accordance therewith.

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<i>Held</i> , that such petition was to be stamped merely as a petition to the court and did not require to be engrossed on a general stamp.	
Emperor v. Ram Saran Lal	19
ACTS—1907—III (PROVINCIAL INSOLVENCY ACT, SECTIONS 5, 15, 16— <i>Insolvency—Grounds for dismissing petition to be adjudged an insolvent.</i>] A petition to be adjudged an insolvent presented under the provisions of the Provincial Insolvency Act, 1907, can be dismissed only upon one or other of the grounds mentioned in section 15 of the Act. It is not a good ground for dismissing such a petition that the petitioner's brother, being joint with the petitioner, has not been made a party to it. <i>Chhatrapat Singh Dugar v. Khawar Singh Lachmaram</i> , 15 A. L. J., 67, and <i>Triloka Nath v. Badri Das</i> , 1, L. R., 36 All, 250, referred to.	
Nct Ram v. Bhagirathi Sah	75
SECTIONS 6, 15, 16— <i>Insolvency—Petitioner examined and evidence taken—Case adjourned—Petitioner absent on adjourned date—Petition dismissed for want of prosecution.</i>] When a petition for a declaration of insolvency has once been presented conformably to the requirements of Act No. III of 1907, the Court is bound, after completing the necessary inquiries, to come to a decision in respect of the various matters spoken of in section 15 of the Act and either to dismiss the petition under the provisions of that section, or to make an order of adjudication. But it cannot dismiss the petition merely because, on an adjourned date, the petitioner does not appear.	
Lachmi Narain Dube v. Kishan Lal	665
SECTION 16 (2), CLAUSE (a)— <i>Civil Procedure Code, 1908 section 60—Insolvency—Attachment of half the salary of the insolvent.</i>] One of the creditors of a person who had been declared an insolvent by the Small Cause Court of Cawnpore, but who had since obtained employment in the Government Press in Calcutta, applied to the Court for attachment of half the insolvent's salary for the benefit of his creditors. <i>Held</i> , that it was no valid reason for rejecting the creditor's application that its allowance would not leave the insolvent enough to live on. <i>Ram Chandra Neogi v. Shayama Chaman Bose</i> , 15 C. W. N., 1050, and <i>Tulsi Lal v. Gusham</i> , 38 Indian Cases, 410, followed.	
Dobi Prasad v. Lewis	231
SECTION 18— <i>Decree obtained by insolvent before adjudication—Attachment of decree—Effect of subsequent adjudication on right of attaching creditor to execute decree.</i>] Where a decree has been attached by a creditor of the decree-holder and subsequently the decree-holder is adjudged an insolvent, the right to execute such decree vests in the receiver in insolvency, and is not retained by the attaching creditor. <i>Raghunath Das v. Sundar Das Khetri</i> , 1, L. R., 42 Calc., 72, referred to.	
Dambai Singh v. Munawar Ali Khan	86
SECTION 22— <i>Insolvency—Execution of decree—Attachment—Objection of claimant to attached property disallowed—Judgment-debtors declared insolvent—Suit by claimant for declaration of title.</i>] Certain property was attached in execution of a decree <i>M</i> , claiming that the property attached belonged to her and not to the judgment-debtors, filed an objection to the attachment. Her objection was disallowed. She then filed a suit for a declaration of her title, and, as the judgment-debtors had meanwhile been adjudicated insolvents, joined as a defendant the receiver of their property. <i>Held</i> , that the suit was maintainable and was not barred by section 22 of the Provincial Insolvency Act,	

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1907. <i>Mul Chand v. Mura Lal</i> , I L R, 3 All 8, dismissed <i>Jhanku Lal v. Puri Lal</i> , I L R, 3 All 204, not noted	
Mohini v. B. J. Nath	582
ACTS—1907—III (PROVINCIAL INSOLVENCY ACT) SECTION 14— <i>In chancery</i> —Attachment of applicant's property for adjudication—Effect of adjudication on the attachment.] After an adjudication in insolv- ency, in attachment of property, though made before the adju- dication, ceases to have any effect, and the property of the insolvent vests in the receiver, who is the person to maintain all proceedings.	
Where no receiver is actually appointed, the Court in the receiver under section 23 of the Provincial Insolvency Act	
Govind Das v. Karan Singh	197
—1908—IX (INDIAN LIMITATION ACT), SECTION 12, See Civil Pro- cedure Code (1908), section 142	1
—SECTION 15, See Civil Pro- cedure Code (1908), section 45	198
—SECTION 28, SCHEDULE I, ARTICLE 144— <i>Right accruing at uncertain intervals—Right to take wood from trees when fallen or cut—Adverse possession</i>] The father of the plaintiffs in 1867 obtained leave from the Collector to plant trees alongside a road on land belonging to Government. He expressed his willingness to do so at his own expense and to tend them, and the only right he asked for was to get the fallen dry wood from the trees. Subsequently the village passed out of the possession of the plaintiffs' father, and on two occasions, in 1900 and in 1910, the defendant, who had purchased the village, got the proceeds of the sale of such wood. The plaintiffs on both occasions asserted their claim to wood or the price thereof, but were unsuc- cessful. Within six years from the date of the last sale they brought a suit for a declaration of their right to get the dry wood by virtue of the agreement of 1867. The defendant pleaded adverse possession. <i>Held</i> , that the right being one which could only be exercised on uncertain occasions and not a right accruing at fixed periods, and as there had been disputes as to the right between the parties on two previous occasions, it could not be said that the defendant had acquired a title by adverse possession.	
<i>Quære</i> , whether section 28 of the Indian Limitation Act, 1908, applies at all to a case like this.	
Dobi Prasad v. Badri Prasad	461
—SCHEDULE I, ARTICLE 11, See Civil Procedure Code (1908), order XXI, rule 58	325
—SCHEDULE I, ARTICLE 116, — <i>Limitation—Sale—Covenant to make good loss in case of vendee being compelled to pay money in excess of sale consideration—Each of covenant—Suit against vendors on covenant of indemnity</i>] Where vendees are suing their vendors on a covenant of indemnity con- tained in their sale-deed, having been obliged to redeem a prior mortgage, the existence of which the vendors did not disclose, limitation runs, not from the date of the sale-deed, but from the date when the plaintiffs suffered actual loss by reason of their being compelled to pay off the prior mortgage charge. <i>Ha v. Tiwa v.</i> <i>Raghunath Tiwa v.</i> , I L R, 11 All, 27, referred to.	
Ram Dulai v. Hardwal Lal	6
—SCHEDULE I, ARTICLE 120— <i>Hypothecation of movable property—Suit to recover money lent by sale of the hypothecated property—Limitation</i>] Where a plaintiff who has lent money on the security of movable property seeks to recover	

the money by sale of the hypothecated property and does not ask for a personal decree against the debtor, the limitation applicable is that provided for by article 120 of the first schedule to the Indian Limitation Act, 1908. *Multan Aftab Lal v. Kanhai Lal*, 1 I. R., 17 A 11, 284, *Nim Chand Bhaba v. Jagat Mohan Chhola*, 1 I. R., 22 Cal., 21, and *Mahalinga Naidu v. Ganapathi Subbann*, 1 I. R., 27 Mad., 522, followed.

Deokinandan v. Gauri 512

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLE 148—*Limitation—Usufructuary mortgage—Right of purchaser of equity of redemption in part of the mortgaged property* [A purchaser of the equity of the redemption in part of the mortgaged property, is entitled to redeem his own portion of the property within sixty years of the date of the mortgage from another person who having purchased another portion of the mortgaged property has redeemed the entire mortgage and is in possession of the entire property. The limitation applicable to a suit of this description is that provided by article 148 of schedule I to the Indian Limitation Act. *Ahfaq Ahmad v. Wazir Ali*, 1 I. R., 14 All., 1, followed. *Jai Kishan Joshi v. Budhanand Joshi*, 1 I. R., 38 All., 188, referred to.

Wazir Ali v. Ali Ismail 663

—SCHEDULE I, ARTICLE 181—*Mortgage—Suit for sale—Application for final decree—Limitation* [An application for final decree in a suit for sale on a mortgage being an application in the suit and not an application in execution, the fact that one such application has been made within the prescribed period of limitation does not operate to extend the period of limitation in favour of a second application, the first having been dismissed for default.

Ahmad Khan v. Muhammad Gauri 230

—SCHEDULE I, ARTICLE 181,
See Civil Procedure Code, (1908), order XXIV, rule 5 203

—SCHEDULE I, ARTICLE 181,
See Civil Procedure Code (1908), order XXIV, rule 6 551

—SCHEDULE I, ARTICLE 182 (5)—*Execution of decree—Limitation—Application accompanied by a copy of the decree—Civil Procedure Code (1908), order XXI, rule 11* [An application for execution of a decree which complies with the requirements of clause (2) of rule 11, order XXI, of the Code of Civil Procedure, cannot be said to be an application which is not "in accordance with law" within the meaning of article 182 (5) of the first schedule to the Indian Limitation Act, 1908 only because it is not accompanied by a copy of the decree, which may be required by the Court under clause (3) of the rule.

Raghunandan Lal v. Badan Singh 209

—*Execution of decree—Limitation—Step in aid of execution.* [An application to the court executing a decree asking that certain objections to the execution of the decree be rejected is a step in aid of execution within the meaning of article 182 (5) of the first schedule to the Indian Limitation Act, 1908.

Tahir-un-nissa Bibi v. Najju Khan 666

—ARTICLE 182 (6) AND SECTION 7—*Execution of decree—"Date of issue of notice"—Minority—Supervention of a minority after limitation has commenced to run.* [Held, on a construction of article 182 (6) of the first schedule to the Indian Limitation Act, 1908, that the expression "the date of issue

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of notice " must be taken as the date on which the order of the court directing that not be issued to the judgment debtor is passed

Held also, that when the decree holders are all of full age at the time of passing, or the decree execution of which is sought, and limitation has already commenced to run, the subsequent intervention of a minority does not entitle the decree-holders to the benefit of section 7 of the Indian Limitation Act, 1908, *Bhagat Bihari Lal v Ram Nulka*, 1 L R, 27 All, 704, referred to *Zaman Hasan v Sunda*, 1 L R 22 All, 199, distinguished

Kalka Bakhsish Singh v Ram Chaman .. 630

ACTS—1903—LV (INDIAN LIMITATION ACT), ARTICLE 182, EXPLANATION I—*Execution of decree—Limitation—Execution of decree of first court and of decree of appellate court for costs carried out separately*] In execution of a decree against *S*, *D* attached a decree held by *S* against himself and others for possession of certain property and costs. This decree had been the subject of an appeal by *D* and one other of the judgment debtors, which had resulted in a decree for costs against the two appellants only. The last application for execution of this decree was made in 1907. As to the lower court's decree *D* made various applications for execution and succeeded in realizing all that was due under it. *S* became insolvent and the receiver sold to one *M* whatever rights *S* may have had under either decree, but on application for execution made by the purchaser, it was *held* that there was nothing more to realize under the original decree and that execution of the appellate decree was barred by limitation

Gulam Muhi-ud-din Khan v Dumbur Singh .. 206

—1908—XVI (INDIAN REGISTRATION ACT), SECTION 17—*Registration—Agreement by reversioners to forego right to sue for declaration respecting an alienation made by the Hindu widow*] *Held*, that an agreement by which the reversioners to certain property in the possession of a Hindu widow agreed to forego their right to sue for a declaration that a gift of such property made by the widow was not binding upon them, was not a document which was compulsorily registrable under section 17 of the Indian Registration Act, 1908.

Bhana v. Guman Singh 384

SECTIONS 32, 33, 71, 73, 75, 87 and 88—*Mortgage-deed—Registration—Presentation—Authority to present document for registration on behalf of executant—Distinction between presentation under part VI and under part XII of the Act*] A mortgage deed was executed on the 20th of November, 1911. Before however the deed could be registered, the mortgagee fell ill. On the 3rd of February, 1912, the mortgagee executed, in favour of a pleader, a power of attorney of the kind referred to in section 32 of the Indian Registration Act, 1908. This was duly authenticated by the sub-registrar, and the document was presented for registration by the appointee on the 5th of February, 1912. On the 8th of February the mortgagee died. The mortgagor failed to appear before the sub-registrar and admit execution, and the sub-registrar refused to register the deed. An application was next presented to the Registrar under section 73 of the Act by the widow of the mortgagee in the capacity of the guardian of the mortgagee's two minor sons, and on the 28th of June, 1912, the Registrar made an order under section 75 (1) of the Act directing that the mortgage deed should be registered. Meanwhile the estate of the minors had been taken under the superintendence of the Court of Wards, and the Collector, as Manager on behalf of the Court of Wards, on the 28th of July, 1912, sent the mortgage-deed by a messenger to the sub-registrar, with a copy of

the Registrar's order mentioned above and an official letter requesting that the document might be registered which was accordingly done. On suit having been brought on the mortgage, some of the defendants raised an objection that the mortgage-deed in suit was not validly registered. *Held*, that the document was properly registered. No valid objection could be sustained as to its presentation, either on the 5th of February, 1912, when it was presented by the pleader acting under his power of attorney given by the mortgagee, or on the 23rd of July, 1912, when it was sent by the Collector to the sub-registrar. The Collector was not bound to present the document in person, and that being so, it was immaterial what means he took to bring it before the sub-registrar. That officer was perfectly justified in presuming the authenticity of the Collector's official letter and in taking action accordingly.

Collector of Moradabad v. Maqbul-ul-Rahman ..

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ACTS—1912—II (CO-OPERATIVE SOCIETIES ACT), SECTION 42 (5) AND (6)—*Order of liquidator declaring each member to be jointly and severally liable—Application for enforcement of order by civil court—Appeal—Jurisdiction.*] A society formed under the Co-operative Societies Act, 1912, went into liquidation. The liquidator having taken mortgages from the various persons who were members of the society and had received advances, proceeded to make an order, purporting to be passed under section 42 (b) of the Act, determining that each of the debtors should be jointly and severally liable for the full amount of the several debts. This order was then taken to the Civil Court having local jurisdiction to be enforced under section 42 (5) (a).

Held, that the liquidator was probably wrong in passing the order which he did, but that, the order being one within section 42 of the Act, the Civil Court had no option but to enforce it, and that no appeal lay to the District Judge, nor a second appeal to the High Court.

Mathura Prasad v. Sheobalak Ram ..

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—(LOCAL)—1901—II (AGRA TENANCY ACT), SECTIONS 10 AND 20—*Attempt to evade the provisions of the law as to the alienation of sir land—Mortgage and relinquishment of ex-proprietary rights executed by two separate documents of even date.*] Certain zamindars, appurtenant to whose proprietary share was a considerable area of sir land, executed on the same day in favour of creditors to whom they were indebted to the extent to Rs. 9,000 two documents. By one of these the proprietors covenanted to mortgage with possession 30 bighas of land forming part of their sir lands. They recited that they had put the mortgagee in actual possession of the land in question, surrendering all their rights in the sir and *khudkash*. They further covenanted that if the mortgagees should fail to obtain possession, or if the mortgagors should after all not give up the sir land from their own cultivation, or should set up any claim to hold it as ex-proprietary tenants, then the mortgagees should be entitled to sue for their mortgage money with heavy interest and to enforce the same by sale of the proprietary rights of the mortgagors not merely in the 30 bighas of sir land, but in a total area of 63 bighas and odd belonging to the mortgagors. The consideration of this document was stated at a sum of Rs. 8,000. A further attempt was made to safeguard the mortgagees by the insertion of a covenant that they should, further, be entitled at any time to sue for the principal of their mortgage debt and to bring to sale the proprietary rights of the mortgagors in this area of 30 bighas which was formally hypothecated as security for the debt. The other document was a deed of relinquishment, by which the mortgagors under the former deed purported to surrender or to relinquish in

favour of the mortgagees in return for a consideration of Rs. 1,000, their rights as ex-proprietary tenants in the 30 bighas of *sir* land in question.

Held, that the whole transaction was but a single one effected under cover of two deeds, and was nothing more than an attempt to evade by an ingenious device the provisions of sections 10 and 20 of the Agra Tenancy Act, 1901.

Moh Chand v. Ihsan-ullah Khan, I. L. R., 39 All., 173, and *Dipar Rai v. Ram Khelawan*, I. L. R., 32 All., 383, followed. *Lekhnaj v. Pashade*, 6 A. L. J., 713, discussed.

Mun Dad Khan v. Ruzman Khan 449

ACTS—(LOCAL)—1901—II (AGRA TENANCY ACT), SECTION 20—*Occupancy tenancy acquired by a member of a joint Hindu family—Profits thrown in/o common stock—Member of joint family other than the tenant allowed to cultivate*] A special Statute like the Agra Tenancy Act can and does modify the operation of the ordinary Hindu Law in certain matters.

Where a zamindar admitted as an occupancy tenant a person who was a member of a joint Hindu family, it was held that such tenant did not, by throwing the profits derived from this land into the common stock of the joint family, cause the tenancy to become part of the joint family property, nor did he, by allowing another member of the joint family to cultivate specific plots forming parts of the holding, effect anything more than the creation of a sub-tenancy in favour of such member.

Kallu v. Sital 314

SECTION 34—*Person occupying land without consent of landlord—Ejectment—Non-occupancy tenant—Usufructuary mortgagees entitled to possession.*] The plaintiffs were the usufructuary mortgagees entitled to possession of the mortgaged property. The defendant having acquired a part of the equity of redemption asserted a right to the possession of some of the *sir* lands comprised in the mortgage without tendering the mortgage money, and somehow managed to get into possession of certain plots.

Held, that section 34 of the Agra Tenancy Act, 1901, applied, and the defendant could be regarded as a person in possession of land without the consent of the landlord and ejected as if he were a non-occupancy tenant. *Baah v. Naubat Singh*, 9 A. L. J., 771, followed.

Jagardoo Singh v. Ali Hammad 300

SECTIONS 57, 65, 167,
See Civil and Revenue Courts 646

SECTIONS 95, 177 (f)—*Civil and Revenue Courts—Jurisdiction—Appeal.*] A party to a suit in a Revenue Court cannot, merely by formally raising an absolutely untenable plea of jurisdiction, remove the case from the Revenue Court to a Civil Court.

Deo Narain Singh v. Sitla Bakhsh Singh 177

SECTION 95, *See Act*
No. VII of 1870, schedule II, article 5; section 7, xi 358

SECTION 150—*Resumption of muafi—"Proprietor"—Perpetual lessee entitled to resume.*] In substitution for a monthly cash payment which the Maharaja of Benares used to make to the lessees, the Maharaja granted to them a perpetual lease of a certain *muafi* village. He

transferred to the lessees all rights of every kind, reserving only to himself an annual sum payable in rent with a right to re-enter in case of default of payment

Held that in the circumstances the lessees must be regarded as "proprietors" within the meaning of section 150 of the *Agr. Tenancy Act, 1901*, and were entitled to sue for resumption of the *muafi*

Mitabidai Singh v. Gouri Naran Singh

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ACTS (LOCAL)—1501—II (AGRI. TENANCY ACT), SECTION 154 AND 158—*Muafi and—Suit for resumption—Portion of muafi converted into a grove, but restored to the position of agricultural land before suit* [While a certain tract had been held rent-free for fifty years and by two successors to the original grantee, but part of the tract had at one time been occupied by a grove, which, however, had ceased to exist some fifteen years before suit, it was *held*, on suit for resumption, that there was no justification for drawing a distinction between that part of the tract which had at one time been a grove, and the rest, which had all along been cultivable land, and that, as section 154 of the *Agr. Tenancy Act, 1901*, did not apply, no portion of the area could be resumed.

Muhammad Isak Khan v. Muhammad Khan

(C)

SECTIONS 161 and 166—

Lambardar and co-share—Suit for profits against land and on—Death of defendant pending suit—Liability of co-appellants for sums not collected owing to neglect of lambardar [It is, on a construction of sections 164 and 166 of the *Agr. Tenancy Act, 1901*, that where a suit for profits having been filed against a lambardar, the lambardar dies pending the suit, and his legal representative is brought on the record as defendant, the respondent is, so far as the assets of the deceased lambardar in his hand are concerned, liable to the same extent as the lambardar, that is to say, not only for money actually collected by the lambardar, but also for money left uncollected owing to his negligence or misconduct. *Musul-un-nissa v. Ghulam Sijjad*, I. L. R., 20 All, 73, and *Dip Singh v. Ram Charan*, I. L. R., 20 All, 13, distinguished.]

Bharat Singh v. Raj Singh

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SECTIONS 175, 177, 193—

Order passed by a Revenue Court staying or refusing to stay a suit—Appeal. [Held, that no appeal will lie to the High Court from the order of a Court of Revenue staying, or refusing to stay, a suit pending before it.]

Quære whether any appeal lies at all.

Krupa Devi v. Ram Chandra Sarup

219

SECTION 193—Order of

remand—Appeal—Preliminary and final decrees [A suit was brought in a Court of Revenue for a declaration that the plaintiff was the proprietor of certain *muafi* land. The court of first instance dismissed the suit. The lower appellate court set aside that decree and allowed the appeal to the extent that it held the plaintiff entitled to be declared a rent-free grantee of so much of the land as was entered in his name. It then added that "the suit be remanded to the lower court for determination of the revenue payable by the plaintiff appellant." Held, that the order being one of remand no second appeal lay to the High Court, and as there was no provision in the *Tenancy Act* about preliminary or final decrees, the order could not be appealed against as a preliminary decree.

Anandgar v. Sri Niwas

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ACTS (LOCAL)—1901—IV [OUDH REVENUE ACT (1886) AMENDMENT ACT], See Act No XXII of 1896, section 3(10) and chapter VIIA ..	541
1904—I (GENERAL CLAUSES ACT), SECTION 24— <i>Effect of General Clauses Act as regard rule framed under the former Municipalities Act of 1900—Municipal Account Code, section 40—Out or duty</i>] A consignee of cloth addressed to one M reached one of the octroi barriers of Bareilly on the 19th of February, 1917. The officer in charge demanded a fine, which M considered properly leviable. The matter was referred to the Octroi superintendent who, as he held the right to do, assessed the duty at Rs 10-9. Under rule 40 of the Municipal Account Code framed under Act No I of 1900, a person in the position of M could appeal against the decision within sixty days, but he could only exercise the right by first paying under protest the duty demanded. M, however, appealed against the decision without making the payment. On the expiry of sixty days a prosecution was instituted against M under Act No II of 1916 and he was fined. He applied in revision to the High Court. <i>Held</i> , that the conviction was legal, the jurisdiction of the court was saved by section 24 of the Local General Clauses Act, and the fact that the prosecution had been instituted under the Municipal Account Code framed under the repealed Municipalities Act (No I of 1900) did not affect the question. <i>Held</i> , also that the mandatory direction in rule 40 of the Municipal Account Code lays down, by inference, a period of 53 days, on the expiry of which without payment as required the offence is complete and a prosecution may be started.	
Emperor v Manik Chand	105
1910—IV (UNITED PROVINCES EXCISE ACT), SECTION 64(c)— <i>Breach of conditions of licence—Breach committed by servant—Responsibility of master</i>] In order to establish an offence under section 64(c) of the United Provinces Act, 1910, against a licence-holder in respect of the alleged keeping of incorrect accounts by a servant, it must be shown that the licence-holder himself allowed the offence to be committed by his servant, or was cognizant of what his servant was doing.	
Emperor v Ram Das	563
1912—VI (UNITED PROVINCES PREVENTION OF ADULTERATION ACT), SECTIONS 4 AND 6— <i>Commission agent exposing adulterated article of food for sale</i>] <i>Held</i> , that a commission agent who exposed for sale (but did not sell) adulterated ghee was liable to punishment under section 4 of the United Provinces Prevention of Adulteration Act, 1912, and could not claim the benefit of section 6 of the Act.	
Emperor v Kedur Nath	661
1916—II (UNITED PROVINCES MUNICIPALITIES ACT), SECTION 307— <i>Disobedience to notice lawfully issued by a municipal board—Recurring fine—Procedure necessary to imposition of daily fine</i>] A Magistrate convicting an accused person of an offence under section 307(b) of the United Provinces Municipalities Act, 1916, cannot, by the same order, further sentence him to a recurring fine in the event of non-compliance with the order of the board.	
<p>The liability to a daily fine in the event of a continuing breach has been imposed by the Legislature in order that a person contumaciously disobeying an order lawfully issued by a municipal board may not claim to have purged his offence once and for all by payment of the fine imposed upon him for neglect or refusal to comply with the said order. The liability will require to be enforced, as often as the municipal board may consider necessary, by the institution of a second prosecution, in which the questions for consideration</p>	

will be, how many days have elapsed from the date of the first conviction under the same section during which the offender is proved to have persisted in the offence, and, secondly the appropriate amount of daily fine to be imposed under the circumstances of the case, subject to the maximum prescribed

Emperor v, Amir Hasan Khan	569
ADOPTION, <i>See</i> Act No IV of 1882, section 6(a)	692
————— <i>See</i> Hindu law	593
ADULTERATION, <i>See</i> Act (Local) No. VI of 1912, sections 4 and 5	661
ADVERSE POSSESSION, <i>See</i> Act No IX of 1908, section 28, schedule I, article 144	461
AGREEMENT, <i>See</i> Act No II of 1899, section 62, schedule I, article 5	19
APPEAL, <i>See</i> Act No. IX of 1872, section 65	558
————— <i>See</i> Act No. II of 1912, section 42 (5) and (6)	89
————— <i>See</i> Act (Local) No. II of 1901, sections 95, 177 (f)	177
————— <i>See</i> Act (Local) No. II of 1901, sections 175, 177, 193	219
————— <i>See</i> Act (Local) No. II of 1901, section 193	652
————— <i>See</i> Civil Procedure Code (1908), section 24	525
————— <i>See</i> Civil Procedure Code (1908), section 47, order XLI, rule 1	12
————— <i>See</i> Civil Procedure Code (1908), section 104, order XXI, rules 90 and 92, order XLIII, rule 1 (j)	122
————— <i>See</i> Civil Procedure Code (1908), section 122	1
————— <i>See</i> Civil Procedure Code (1908), order XXI, rule 95	216
————— <i>See</i> Civil Procedure Code (1908), order XXXIV, rules 4, 5, and 10	109
————— <i>See</i> Civil Procedure Code (1908), order XXXIV, rule 6	553
————— <i>See</i> Civil Procedure Code (1908), order XVI, rule 22	636
————— <i>See</i> Civil Procedure Code (1908), order XLIII, rule 1	659
————— <i>See</i> Civil Procedure Code (1908), order XLVII, rule 7	68
————— <i>See</i> Criminal Procedure Code (1908), section 195	21
————— <i>See</i> Privy Council	497
—————, <i>in forma pauperis</i> , <i>See</i> Civil Procedure Code (1908), order XLIV, rule 1	381
ARMS, <i>See</i> Act No. XI of 1878, section 19 (f)	420
ATTACHMENT, <i>See</i> Act No III of 1907, section 18	86
————— <i>See</i> Act No III of 1907, section 22	582
————— <i>See</i> Act No. III of 1907, section 23	197
BOND, <i>See</i> Hindu Law	17
CERTIFICATE OF SUCCESSION, <i>See</i> Act No. VII of 1889, sections 7 and 9	81
"CHRISTIAN", <i>See</i> Act No. XV of 1872, sections 3 and 68	393
CIVIL AND REVENUE COURTS— <i>Jurisdiction</i> — <i>Tenant taking a partner in cultivation on agreement to pay half the tenant's rent to him—Suit on such agreement by tenant against partner—Small Cause Court.</i> Plaintiff, being the tenant of certain plots of agricultural land on a rental of Rs 60 a year, took the defendant into partnership on the terms that they were to cultivate jointly and divide the produce equally, and that defendant was to pay half the rent annually to the plaintiff. <i>Held</i> , that a suit by plaintiff to recover from defendant the share of the rent payable by him was a	

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suit for damages for breach of contract cognizable by a Court of Small Causes, and not a suit for rent within the meaning of the Agra Tenancy, Act, 1901.	
Ram Nath v. Sekhdar Singh	51
CIVIL AND REVENUE COURTS— <i>Jurisdiction—Suit by zamindar for damages in respect of the felling of trees on agricultural land by tenants—Act (Local) No II of 1901 (Agra Tenancy Act), sections 57, 65, 177.</i> <i>Held</i> , that a suit for damages for the alleged wrongful felling by the tenant of trees on an agricultural holding is not a suit which is excluded from the jurisdiction of a civil court. <i>Laashman Das v. Mohan Singh</i> , 9 A. L. J., 672, referred to.	
Mansukh Ram v. Birraj Saran Singh	646
—(Jurisdiction), <i>See</i> Act (Local) No. II of 1901, sections 95, 177 (f)	177
— <i>See</i> Act (Local) No. II, of 1901, sections 175, 177, 193	219
CIVIL PROCEDURE CODE (1882), SECTION 815— <i>Execution of decrees—Sale in execution—Auction-purchaser deprived of property purchased owing to failure of judgment-debtor's title—Suit to recover purchase money.</i> Where property of a judgment-debtor had been sold twice over in execution of decrees against him and purchased twice by different purchasers it was <i>held</i> , that the second purchaser took no title by his purchase, inasmuch as at the time of sale the judgment-debtor's title was extinct, and that he was entitled to recover the purchase money which he had paid, and to follow it into the hands of other creditors of the judgment-debtor amongst whom it had been rateably distributed.	
Girdhar Das v. Sidheshwari Prasad Narain Singh ..	411
—(1908), SECTION 11, EXPLANATION V; ORDER XX, RULE 12— <i>Suit for possession and mesne profits—Decree silent regarding future mesne profits—Fresh suit for such profits not barred.</i> The plaintiff claimed possession of immovable property and mesne profits to the date of suit; also mesne profits <i>pendente lite</i> and subsequent to decree. The court gave a decree for mesne profits to the date of suit, but the decree was silent as to mesne profits <i>pendente lite</i> or subsequent to decree.	
<i>Held</i> , on suit by the plaintiff for further mesne profits to the date of his obtaining possession, that there was nothing in the present Code of the Civil Procedure of 1908, any more than in the former Code of 1882, to bar such a suit.	
<i>Ram Dayal v. Madan Mohan Lal</i> , I L. R., 21 All., 425, followed. <i>Doraiswami Ayyar v. Subramania Ayyar</i> , I L. R., 41 Mad., 188, referred to	
Muhammad Ishaq Khan v. Muhammad Rustam Ali Khan	292
<i>Mortgage—Suit for sale—Person claiming paramount title impleaded—Decree in favour of mortgagee plaintiff—Suit by paramount owner for declaration of title—Res judicata.</i> In a suit brought by a mortgagee to enforce his mortgage, a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary party and the question of the paramount title cannot be litigated in such a suit. <i>Joti Prasad v. Aziz Khan</i> , I L. R., 31 All., 11, and <i>Jaggeshwar Dutt v. Bhuban Mohan Mittal</i> , I L. R., 33 Cal., 425, referred to.	
Two suits for sale on separate mortgages of the same property were filed, and in each the mortgagees impleaded a third party as a subsequent mortgagee of a portion of the property in suit. The party so impleaded was in reality the owner of a considerable portion	

of the property comprised in the mortgages sued upon, though he was not impleaded in that capacity. In the first suit the puisne mortgages did not appear. In the second he attempted to set up his paramount title, but was not allowed to do so. The mortgagors likewise attempted to set up the paramount title of the person impleaded as the puisne mortgagee, and in their case also the defence was ruled out. In the result, decrees were passed in favour of the plaintiff. The puisne mortgagees then brought a suit for a declaration of his title to part of the mortgaged property. *Held*, that the suit was not barred by anything which had happened in the course of the previous litigation. *Girija Kanta Chakrabutty v. Mohim Chandra Acharya*, 35 Indian Cases, 294, referred to.

Gobardhan v. Munna Lal	584
CIVIL PROCEDURE CODE (1908), SECTION 11, <i>See</i> Hindu law ..	593

—SECTION 24—*Act No. IX of 1887 (Provincial Small Cause Courts Act), section 35—Transfer of Small Cause Court suit—Appeal—Jurisdiction.*] A Small Cause Court suit valued at Rs. 273 was pending in the court of a Subordinate Judge who had Small Cause Court jurisdiction up to Rs. 500. The Subordinate Judge went on leave and was succeeded by an officer whose Small Cause Court jurisdiction was limited to Rs. 250. Subsequently, by order of the District Judge, all Small Cause Court suits above Rs. 250 in value were transferred to the court of a Munsif. *Held* that, with reference to section 24 of the Code of Civil Procedure, the suit so transferred must be deemed to have been tried by the Munsif as a Court of Small Causes, and from his decision no appeal lay.

Chatur Singh v. Musammam Bania	525
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—SECTION 47; ORDER XLI, RULE 1—*Execution of decree—Limitation—Appeal—Copy of decree or final order necessary to the filing of an appeal*] On an objection taken by the judgment-debtor that the execution of a decree was barred under section 48 of the Code of Civil Procedure, the Court, in disallowing the objection, wrote a judgment and also drew up a formal order, or decree, being the formal expression of the decision of the question.

Held, that order XLI, rule 1, of the Code applied, and no valid appeal could be filed against the decision of the court below which was not accompanied by a copy of such formal order, or decree. *Khaode Samda v. Devi v. Janendra Nath Pal Chaudhuri*, 6 C. W. N., 281, discussed.

Qasim Ali Khan v. Bhagwanta Kunwar	12
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—SECTION 43—*Execution of decree—Limitation—"Subsequent order"—Order by executing court giving time for payment—Act No. IX of 1908 (Indian Limitation Act), section 15.*] The expression "subsequent order" in section 43 (b) of the Code of Civil Procedure, means a subsequent order by the court which made the decree and acting as that court and not an order of a court executing the decree. An order made by a court executing a decree, allowing a judgment-debtor time to pay up the balance of the decretal money would not be subsequent order within the meaning of section 48 and would not give a fresh period to the decree-holder to execute his decree. Nor is an order merely giving time for payment an order staying execution or an injunction, and the time so given cannot be excluded in computing limitation against the decree-holder.

Jurawan Pasi v. Mahabir Dhar Duhe	198
1907, section 16 (2), clause (a)	213

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CIVIL PROCEDURE CODE (1908), SECTION 60(c); ORDER XXI, RULE 92— <i>Execution of decree—Sale in execution—House of an agriculturist—Objection not taken at time of sale, but in answer to a suit for possession by the auction purchaser—Estoppel</i>] <i>Held</i> , that a judgment-debtor, who could and ought to have raised objections to the sale of his property at the time of the sale, could not be permitted long after the sale had been confirmed to raise the same objections in answer to a suit by the auction purchaser for possession of the property purchased by him <i>Umed v. Jas Ram</i> , I L. R., 29 All., 612, <i>Pandurang Balaji Bagave v. Krishnaji Govind Parab</i> , I L. R., 28 Bom., 125, and <i>Dwarka Nath Pal v. Turini Sanhar Ray</i> , I. L. R., 34 Cal., 199, followed.	
<i>Lala Ram v. Thakur Prasad</i>	680
SECTION 104; ORDER XXI, RULES 90 AND 92; ORDER XLIII, RULE 1 (j)— <i>Execution of decree—Sale in execution—Application to set aside sale rejected—Appeal</i> .] Under order XXI, rule 90, of the Code of Civil Procedure, 1908, an application may be made to set aside a sale held in execution of a decree, upon the ground, amongst others, of fraud in the publication or conduct of the sale, and if this application is refused under rule 92, an appeal lies under order XLIII, rule 1, clause (j); but no second appeal is allowed from the order of the appellate court.	
<i>Sheo Prasad Singh v. Premna Kunwar</i>	122
SECTION 114, <i>See Decree</i> ..	579
SECTION 115— <i>Revision—Jurisdiction of High Court—Question of law or fact bearing on jurisdiction of Court</i> .] When a question of jurisdiction is involved, the High Court is competent to revise a conclusion of law or fact which bears on such question. <i>Balakrishna Udayar v. Vasudeva Ayyar</i> , I. L. R., 40 Mad., 793, explained.	
<i>Bihari Lal v. Baldeo Narain</i>	674
SECTION 122— <i>Power of High Court to make rules—Rules of Court of the 13th January, 1898, Chapter III, rule 2—Appeal—Limitation—Act No. IX of 1903 (Indian Limitation Act), section 12</i> .] The High Court framed a rule, with reference to the presentation of the appeals from appellate decrees, that "No memorandum of appeal from an appellate decree or from any order shall be presented unless accompanied by a copy of the decree or order appealed against, and, where it exists, a copy of the judgment of the court of first instance . . ."	
<i>Held</i> , on a construction of this rule, that it did not connote that the appellant had a right to exclude from the period of limitation for filing his appeal the time requisite for obtaining a copy of the judgment of the court of first instance.	
<i>Held</i> , also, that having regard to section 122 of the Code of Civil Procedure, 1908, the rule in question, was not <i>ultra vires</i> .	
<i>Narsingh Sahai v. Sheo Prasad</i>	
ORDER I, RULE 3; ORDER XXIII, RULE 1— <i>Procedure—Suit dismissed for misjoinder of parties and of causes of action—Plaintiff permitted to withdraw suit with liberty to bring fresh suits</i> .] Where it was found on second appeal to the High Court that the suit out of which the appeal had arisen was bad for misjoinder of parties and of causes of action, in that there was no community of interest between the various defendants, whose sole connection with each other was that they were purchasers of different portions of property, the whole of which was claimed by the plaintiff, the High Court permitted the suit to be withdraw	

on terms as to costs, with liberty to the plaintiff to bring separate suits against each of the defendants

Afzal Shah v Lachmi Narain

CIVIL PROCEDURE (ODE (1908) ORDER VI, RULE 14—*Procedure—*

Plaint—Distinction between signature of plaintiff and authorization of suit—Suit filed on behalf of a person in jail] Order VI, rule 14, of the Code of Civil Procedure, which requires a pleading to be signed by a party, is merely a matter of procedure. It is the business of the Court to see that this provision is carried out. It is also the business of the Court to see that a suit is authorized by the plaintiff. The authority for the bringing of a suit is a question of principle. But where a suit is duly authorized, the proper signing of the plaint is a matter of practice only, and if a mistake or omission has been made, it may be amended at any time. *Basdeo v John Smith*, 1 L R, 22 All, 55, *Rajni Ram v Katekar Nath*, 1 L R, 18 All, 398, and *Cropper v Smith*, 26 Ch. D, 700, referred to.

The mere fact that the signing of a plaint by or on behalf of a plaintiff who was in jail at the time might have involved a breach of jail regulations has nothing to do with the question of the validity or invalidity of the plaint.

In the matter of the petition of Bisheshar Nath

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ORDER IX, RULES 3 AND 6—*One plaintiff out of six present—Appearing plaintiff general attorney for the others—Dismissal of suit for want of prosecution—Dismissal on merits—Second suit on same cause of action barred*] On the date fixed for the hearing of a suit neither the defendants nor their pleader appeared. The plaintiffs' pleader also did not appear, but one of the plaintiffs was present. He was also the general attorney of the other plaintiffs. The court dismissed the suit for "want of prosecution." The plaintiffs applied to have the dismissal set aside, but their application was refused on the ground that their remedy was by means of a separate suit. They consequently brought a second suit claiming the same reliefs as they had claimed in the former suit. Held that, inasmuch as all the plaintiffs must be deemed to have been present through the plaintiff who had appeared and was general attorney for the non-appearing plaintiffs, the suit must be regarded as having been dismissed on the merits, and not under order IX, rule 3, of the Code of Civil Procedure, and a second suit on the same cause of action was therefore barred.

Hingu Singh v. Jhuni Singh

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ORDER XXI, RULE 7—*Execution of decree—Decree passed against a deceased person—Objection by alleged representatives of the deceased judgment debtor that the decree is a nullity and incapable of execution against him*] It is a good answer to an application for execution against the alleged representatives of a judgment-debtor to show that the judgment-debtor was dead at the time that the decree was made, and that such decree is void and incapable of an execution against the person so dead. *Imdad Ali v. Jagan Lal*, 1 L R, 17 All, 478, followed.

Sripat Narain Rai v. Tribeni Misra

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ORDER XXI, RULE 11, *See Act No IX of 1908, schedule I, article 162 (5)*

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ORDER XXI, RULE 32—*Execution of decree—Decree declaring rights of certain parties and forbidding interference therewith by other parties to suit—Mode of enforcing such decree*] A decree was passed declaring the rights of certain parties to the suit to conduct certain religious ceremonies and enjoining on certain other parties to the suit to refrain from

interfering with the celebration of the said ceremonies by the parties in whose favour the decree was passed.

Held, that it was not competent to the court passing such decree to secure obedience thereto by directing the Superintendent of Police to see that the ceremonies were carried out and to prevent interference therewith, nor was it competent to the court to appoint a commissioner to see that the terms of the decree were given effect to

Goswami Girdhan Lalji v. Goswami Maksudan Ballabh

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CIVIL PROCEDURE CODE (1908) ORDER XXI, RULE 58—Execution of decrees—Act No. IX of 1903 (Indian Limitation Act), schedule I, article 11—Limitation—Objection to attachment dismissed—Subsequent suit for possession—Investigation of objection by court.] Article 11 (1) of the first schedule to the Indian Limitation Act, 1903, applies only to those orders made under order XXI, rule 51, which are made after investigation of the claim or objection; but it does not follow that, merely because the claimant has not adduced evidence or has not appeared, there has been no investigation within the meaning of the rule. *Rahim Bux v. Abdul Kader*, I. L. R., 32 Calc., 537, *Shagun Chand v. Shibli*, 8 A. L. J., 626, *Chandi Prasad v. Nand Kishore*, 20 Indian Cases, 369, *Lachmi Narain v. Marindall*, I L. R., 19 All., 263, and *Kunj Behari Lal v. Kandh Prasad Narain Singh*, 6 C. L. J., 362, referred to.

Gokul v. Mohri Bibi.. .. .

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ORDER XXI, RULE 66—Execution of decrees—Suit for declaration that property is not liable to attachment and sale—Valuation of suit.] In a suit for a declaration that property is not liable to attachment and sale in execution of a decree where the value of the property in question is in excess of the amount claimed in execution of the decree, the proper valuation of the suit for the purpose of jurisdiction is, not the value of the property, but the amount for which the decree may be executed. *Khetra Pal v. Mumtaz Begam*, I. L. R., 38 All., 72, followed. *Radha Kunwar v. Reoti Singh*, I. L. R., 38 All., 483, referred to.

Anandi Kunwar v. Ram Niranjan Das

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ORDER XXI, RULES 89 AND 92—Execution of decrees—Application to set aside sale in execution—Decree sent to Collector for execution—Tender of money to the Collector, the Civil Courts being closed—"Court."] The word "Court" as used in rules 89 and 92 of order XXI of the Code of Civil Procedure means the Civil Court, and not, in the case of a decree being transferred to the Collector for execution, the Collector.

Fazal Rab v. Manzur Ahmad

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ORDER XXI, RULE 95—Execution of decrees—Transferee from auction purchaser—Order for delivery of possession—Appeal—Revision.] A purchased certain immovable property at an auction sale held in execution of a decree and thereafter transferred the property so purchased to B, the decree-holder. B applied under order XXI, rule 95, of the Code of Civil Procedure for an order for delivery of possession of the property purchased from A, and an order was passed. *Held*, that no appeal lay from the order for delivery of possession. *Bhagwati v. Banwar Lal*, I. L. R., 31 All., 82, referred to.

Buddhu Misir v. Bhagirathi Kunwar

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ORDER XXIII, RULE 1; SECTION 115—Application by plaintiff to withdraw suit with leave to bring a fresh one made when hearing of suit was nearly concluded—Leave

granted to bring a fresh suit—Exercise of discretion—Revision] A suit was instituted in the court of the Munsif. After the evidence had concluded and either during or after the argument, the plaintiffs applied for leave to withdraw with liberty to bring a fresh suit. They based their application upon the fact that they had failed to give formal proof of a plaint which was essential to their success. The court granted leave to bring a fresh suit. Upon an application in revision against this order *held*, that the court had jurisdiction to grant leave to the plaintiffs to bring a fresh suit, and the fact that the court may have exercised, and probably did exercise, a wrong discretion in granting the plaintiffs' application was not sufficient to bring the case within the purview of section 115 of the Code of Civil Procedure.

Jhunku Lal v Bisheswar Das

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CIVIL PROCEDURE CODE (1908), ORDER XXXIV, RULES 12 AND 3—*Execution of decree—Payment of part of decretal amount into court—Effect of payment as regards running of interest on the decree*] Where money is paid into court by the judgment-debtor in satisfaction of a decree, interest on the decree will cease from the date of payment in proportion to the amount paid, although such amount may not in fact be the whole amount due under the decree.

Amtul Habib v. Muhammad Yusuf

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ORDER XXXIV, RULES 4, 5 AND 10—*Suit for sale on a mortgage—Form of decrees—Construction of decrees—Costs—Appeal*] A suit for sale on a mortgage was decreed by the court of first instance, dismissed by the court of first appeal, and again decreed by the High Court. In the judgment of the High Court it was stated — “We must allow the appeal, set aside the decree of the lower appellate court, and restore the decree of the court of first instance with costs in all courts.” The decree of the High Court was drawn up on one of the High Court forms. It stated that the appeal had been allowed, the decree of the lower appellate court set aside, and the decree of the court of first instance restored. It went on to state — “And it is further ordered that the respondent do pay to the appellant Rs. 554-6-9, the amount of costs incurred by the latter in this Court and in the lower appellate court.”

Held, that in construing this decree it was open to the Court to consider, first, the nature of the suit, secondly, the judgment of the High Court upon which the decree was founded, and the general practice of the Court, and that, considering these matters, the intention was that there should be the ordinary mortgage decree awarding the costs incurred in the suit and up to the time of the final decree to be realized by sale of the mortgaged property *Magbui Fatima v Lalla Prasad*, 1 L. R., 20 All., 513, and *Ambe Sahar v. Shambhu Nath*, E. S. A. No. 87 of 1900, followed.

Dambar Singh v Kalyan Singh

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ORDER XXXIV, RULE 5—*Suit for sale on a mortgage—Application for final decree—Limitation—Act No. IX of 1908 (Indian Limitation Act), schedule I, article 181*] An application for a final decree under order XXXIV, rule 5, of the Code of Civil Procedure is an application in the suit, and not an application in execution; the limitation applicable is that prescribed by article 181 of schedule I to the Indian Limitation Act, 1908, and time begins to run, if there has been an appeal in the suit, from the date of the decree of the final court of appeal *Gajadhar Singh v. Kishan Jivan Lal*, 1 L. R., 89 All., 641, referred to.

Nizam-ud-din Shah v Pohra Bhim Sen

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ORDER XXXIV, RULE 5—*Application for decree—Limitation—Act No. IX of 1908*

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(*Indian Limitation Act*), schedule I, article 181.] An application for a decree under the provisions of order XXXIV, rule 6, of the Code of Civil Procedure is not an application for the execution of the original decree for sale, but is an application in the original suit for a new decree. Such an application is governed as to limitation by article 181 of schedule I to the Indian Limitation Act, 1908, and must be made within three years from the date when the right to apply accrued. *Bhai Lal v. Bisheshwar Dayal*, 9 A. L. J., 569, refused to

Muhammad Ihtifaz Hasan v. Ahm-un-nissa Bibi .. 551

CIVIL PROCEDURE CODE (1908), ORDER XLI, RULE 22—*Appeal—Cross-objection—Objection taken by respondent against co-respondent*.] In a suit for sale on a mortgage, the deed upon which the suit was based purported to have been executed by six persons. In the court of first instance, however, execution was held to have been proved as against four only of the alleged executants. These four appealed, making the other two alleged executants respondents along with the plaintiffs. The plaintiffs also filed cross-objections, in which they sought to fix the two defendants respondents with liability for the mortgage deed.

Held, that the plaintiffs were not precluded from filing objections against their co-respondents. *Abdul Ghani v. Muhammad Fasih*, I L. R., 28 All., 95, followed. *Kattu v. Mann*, I L. R., 23 All., 93, referred to

Musleh Bibi v. Ram Narain Sahu .. 536

—, ORDER XLIII, RULE 1—*Appeal—Order returning memo andum of appeal to be presented to the proper court.*] No appeal lies against the order of an appellate court returning a memorandum of appeal to be presented to the proper court.

Mun-ud din Khan v. Purn Krishan Chakravarti .. 659

—, ORDER XLIV, RULE 1—*Application for leave to appeal in forma pauperis—Application rejected—Further application for leave to pay the full court fee also rejected—Revision*.] The rejection of an application made under order XLIV, rule 1, of the Code of Civil Procedure, for leave to appeal as a pauper, is not the rejection of the appeal. It is, therefore, no ground for rejecting a subsequent application for permission to pay the full court fee on the appeal.

Muhammad Farzand Ali v. Rihai Ali .. 331

—, ORDER XLVII, RULE 7—*Review of judgment—Appeal from order granting of review—Grounds of appeal.*] In an appeal under order XLVII, rule 7, of the Code of Civil Procedure, 1908, from an order granting an application for review of judgment the appellant is strictly limited to the grounds set forth in the rule.

Khurshed Alam Khan v. Rahmat-ullah Khan .. 63

COMMISSION AGENT, *See* Act (Local) No. VI of 1912, sections 4 and 6, 661

COMMITMENT, *See* Criminal Procedure Code, sections 476 and 478 .. 116

ILLEGAL—, *See* Criminal Procedure Code, section 478.. 32

COMPANY—*Winding up—Contributory—Application for allotment of shares made by alleged contributory under conditions which were not carried out by the Company.*] A, who was the holder of fifty shares in a limited liability Company, entered into an agreement with the Company through its managing director to take 100 more shares, on the conditions (a) that he was to be appointed a "terminal director" of the Company and (b) that the business of the Company was to be transferred from Meerut, where it had been formed, to Saharanpur.

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The 150 shares were allotted to A, but he never paid the allotment money, and, though the business of the Company was, nominally at least, transferred to Saharanpur, A was never appointed a director. Shortly after this allotment the Company went into liquidation.	
<i>Held</i> , that A could not be made a contributory in respect of the 150 shares which he had offered conditionally to take. <i>The London and Provincial Provident Association, Ltd., in re Mogridge</i> , 57 L. J., Ch., 982, referred to.	
F. B. Powell v. S. Sen	45
COMPENSATION, <i>See</i> Act No. XLV of 1860, section 250	610
————— <i>See</i> Act No. XLV of 1860, section 494	615
————— <i>See</i> Act No. I of 1894, sections 23, 49	367
————— <i>See</i> Criminal Procedure Code, section 250	79
COMPLAINT, <i>See</i> Act No. XLV of 1860, section 120B	41
————— <i>See</i> Criminal Procedure Code, section 4	641
————— <i>See</i> Criminal Procedure Code, sections 303 and 437	138
COMPROMISE, <i>See</i> Act No. II of 1899, section 62; schedule I, article 5	19
CONSPIRACY, <i>See</i> Act No. XLV of 1860, section 120B	41
CONSTRUCTION OF DOCUMENT, <i>See</i> Hindu law	575
CONTRIBUTION, <i>See</i> Company	45
—————, <i>See</i> Costs	672
CO-OPERATIVE SOCIETY. Order passed by liquidator of—, <i>See</i> Act No. II of 1912, section 42 (5) and (6)	89
COSTS— <i>General rules of the High Court (Civil), rules 21, 25—Pleader's fee—Order on objection as to jurisdiction raised by defendant returning plaint for presentation to proper court.</i> <i>Held</i> , that rule 21 of the General Rules (Civil), and not rule 25, applied to a case where a question as to the jurisdiction of the court, having been raised by the defendant, was decided against the plaintiff, and the plaint returned for presentation to the proper court.	
Gauri Sahai v. Bahree	515
————— <i>Joint decree for costs against defendants claiming under separate titles defendants being also wrong-doers—Suit for contribution—Suit not maintainable.</i> Two persons, each holding by a separate title a half share in certain property were arrayed as co-defendants to a suit for recovery of a share in the said property. The plaintiffs obtained a decree with costs, the order for costs being as against the defendants jointly. The plaintiffs decree-holders executed the decree for costs against one of the judgment-debtors, and he then sued the other judgment-debtor for contribution. <i>Held</i> , that the suit would not lie. <i>Fakir v. Tasaddug Husain</i> , I. L. R., 19 All., 462, followed.	
Nand Lal Singh v. Beni Madho Singh	672
————— <i>See</i> Act No. IX of 1872, section 65	558
————— <i>See</i> Civil Procedure Code (1908), order XXXIV, rules 4, 5 and 10	109
"COURT," <i>See</i> Civil Procedure Code (1908), order XXI, rules 89 and 91	425
COURT FEE— <i>Appeal—"Decree"—Civil Procedure Code (1908), order XXXIV, rule 6—Order rejecting application for a decree over against the mortgagor.</i> An order on an application for a decree under order XXXIV, rule 6, of the Code of Civil Procedure is a "decree" as that term is defined in the Code. An appeal, therefore, from such an order must bear an <i>ad valorem</i> court fee stamp, and not merely a stamp of Rs. 2.	
Muhammad Ibtifat Husain v. Alim-un-nissa Bibi	553

COURT FEE, <i>See</i> Act No. VII of 1870, section 7, vi	Page. 352
— <i>See</i> Act No. VII of 1870, sections 19, viii, 19 I, schedule I, No. 11, and schedule III	279
— <i>See</i> Act No. VII of 1870, schedule I, article 1.. ..	98
— <i>See</i> Act No. VII of 1870, schedule II, article 5, section 7, xi	358
— <i>See</i> Civil Procedure Code (1908), order XXXIV, rule 6 ..	563
CRIMINAL MISAPPROPRIATION, <i>See</i> Act No. XLV of 1860, sections 403 and 22.. ..	119

CRIMINAL PROCEDURE CODE, section 4—*Act No. XLV of 1860 (Indian Penal Code), sections 193 and 210—Sanction to prosecute—Complaint—Letter from trying magistrate to his official superior asking merely for direction as to procedure.*] The holder of a decree for rent, passed by an Assistant Collector of the second class, took out execution for a larger sum than was in fact due and also gave in his application a wrong date as the date of the decree. The judgment-debtor paid the amount claimed under compulsion, and thereafter applied for sanction to prosecute the decree-holder. Upon receipt of this application the Assistant Collector wrote a letter to the District Magistrate, forwarding it through his immediate superior the Sub-divisional Magistrate, in which he stated all the facts of the case and concluded by soliciting orders in the case. The Sub-divisional Magistrate instead of forwarding this letter to the District Magistrate, himself passed orders for the prosecution of the decree-holder. He tried the case himself and convicted the decree-holder of offences under sections 193 and 210 of the Indian Penal Code. On appeal the conviction and sentence were upheld by the Sessions Judge.

Held, that the letter written by the Assistant Collector to the District Magistrate, in which the former did not ask that any action should be taken by the Magistrate, but merely for directions as to how he should proceed, did not amount to a "complaint" within the meaning of section 4 of the Criminal Procedure Code, and, there being no complaint, the trial was illegal.

Emperor v. Sheo Sampat Pande 641

—SECTIONS 107, 125 AND 438—*Security to keep the peace—Revision—Jurisdiction of High Court and Sessions Judge.*] A Magistrate of the first class ordered certain persons to give security for keeping the peace. The persons to be bound over applied to the Sessions Judge to revise the order. The Sessions Judge was of opinion that the applicants should not have been bound over and accordingly referred the case to the High Court with a recommendation that the order should be set aside. *Held* that, the order having been passed by a Magistrate subordinate to the District Magistrate, the record should, under section 125 of the Code of Criminal Procedure, have been laid before the District Magistrate to deal with the matter.

Where a Code gives a particular court jurisdiction to act in certain matters, it is that court which should be applied to and not the High Court. *Banarsi Das v. Partab Singh*, I. L. R., 35 All., 180, referred to.

Emperor v. Lalji 140

—SECTIONS 110, 123—*Security for good behaviour—Security furnished—Record not required to be sent to the Sessions Judge for orders.*] Under section 123, clause (2), of the Code of Criminal Procedure it is only necessary to lay the proceedings before the Sessions Judge or the High Court when security has

not been given, not when it has been given. *Rai Ishi Pershad v. Queen-Empress*, I. L. R., 23 Calc., 621, referred to.

Emperor v. Ram Kishan 39

CRIMINAL PROCEDURE CODE, SECTIONS 110 (f) AND 117.—*Security for good behaviour—Evidence for general repute not admissible when the case for the prosecution rests on section 110 (f).* In a proceeding under section 110 of the Code of Criminal Procedure, where the basis of the Court's order is clause (f) of that section, the fact that the person against whom the proceeding is taken is so desperate and dangerous as to render his being at large without security hazardous to the community is not a fact which under section 47 of the Code can be proved by evidence of general repute

Emperor v. Indar 372

SECTION 117 (3), *See* Act No. XVIII of 1879, section 36 153

SECTION 144, *See* Act No. XLV of 1860 sections 332, 323 28

SECTION 145—*Government of India Act, 1915, section 107—Order under section 145 of the Code of Criminal Procedure made by a magistrate duly empowered to act under chapter XII of the Code—Revision—Jurisdiction* When proceedings are in intention, in form and in fact proceedings under chapter XII of the Code of Criminal Procedure, and are taken by a magistrate duly empowered to act under that chapter, the High Court has no power to send for the record of those proceedings, either under the Code of Criminal Procedure or under the Government of India Act, 1915. *Matukdhara Singh v. Jaisi*, I. L. R., 39 All., 612, followed.

It is, however, open to a party in such a case to satisfy the High Court that property of which he is entitled to possession has been dealt with by an order which has no legal authority at all, and he may do so by an affidavit or in any other reliable manner, and thereby invoke the superintending power of the Court.

Sundar Nath v. Barana Nath 364

SECTION 195—*Sanction to prosecute—Appeal against order refusing sanction—Munsif of Jaunpur.—Additional Sessions and Subordinate Judge of Jaunpur.—Act No. XII of 1887 (Bengal, Agra and Assam Civil Courts Act), section 21 (4)* Held that an application to revoke or grant a sanction for a prosecution granted or refused by the Munsif of Jaunpur would lie to the Additional Sessions and Subordinate Judge of Jaunpur.

Held also that a court to which such an application is made is competent to take additional evidence for the purpose of satisfying itself whether sanction ought or ought not to be granted. *Rahmatullah v. The Emperor*, 32 Indian Cases, 157, followed

Emperor v. Jagrup Shukul 21

SECTION 195—*Sanction to prosecute—Period for which sanction remains in force—Terminus a quo.* Under clause (6) of section 195 of the Code of Criminal Procedure, the date on which sanction is given is the date of the order of the court which originally granted sanction and not the date of any subsequent order refusing to set it aside. *In re Muthukudam Pillai*, I. L. R., 6 Mad., 190, followed.

Tilak Ram v. Dalip Singh 338

SECTION 196 A, *See* Act No. XLV of 1860, section 120 B 41

SECTION 250—*Trivoltous or vexatious accusation—Compensation—Against whom order for compensation can*

be made] It is not necessary that the person against whom an order for compensation under section 250 of the Code of Criminal Procedure is made should be the person who himself gives information to a Magistrate in consequence of which another is accused of an offence, provided that he is the person upon whose information an accusation is made

Emperor v Bahawal Singh 79

CRIMINAL PROCEDURE CODE, SECTION 250—*Compensation—Accused tried on two charges and acquitted on one but convicted on the other*] Section 250 of the Code of Criminal Procedure is only applicable where the trying court discharges or acquits the accused altogether

It cannot be made use of where the accused, being tried on two charges, is acquitted on one, but convicted on the other
Mukht Bewa v. Jhotu Santha, I L R, 24 Calc, 53, followed

Muhammad Ali Khan v. Raja Ram Singh 610

SECTION 250, *See* Act No. XLV of 1860, section 494.. .. 615

SECTIONS 308 and 437—*Complaint—Summary dismissal of complaint—Order for further inquiry made without notice to show cause being given to accused*] *Held*, that it is not necessary to the setting aside of an order under section 208 of the Code of Criminal Procedure, where the person against whom the complaint was made has never been called on to appeal, that notice to show cause should be given to such person *Angun v Ram Prabhan*, I L R., 35 All, 78, and *Hari Dass Sanyal v Saritulla*, I. L. R., 15 Calc, 603, followed.

Emperor v. Liaquat Husain 136

SECTION 350—*Procedure—Jurisdiction—Magistrate ceasing to have jurisdiction by reason of the transfer of a case pending before him to another court—Evidence not necessarily to be reheard*] Section 350 of the Criminal Procedure Code applies as much to cases in which a Magistrate ceases to exercise jurisdiction so far as the particular case in question is concerned by reason of its transfer to another court as to cases in which the Magistrate ceases to exercise jurisdiction by reason of his own death or transfer to another post

Mahesh Chandra Saha v. Emperor, I L R, 35 Calc, 457,
Kudrat-ullah v Emperor, I L R., 39 Calc, 781, and *Palamandy Goundan v Emperor*, I. L. R., 32 Mad, 218, followed.

Emperor v. Ram Das 307

SECTION 437—*Accused discharged by Magistrate—Order for further inquiry—Notice—Judicial discretion—Practice.*] Nothing in section 437 of the Code of Criminal Procedure requires previous notice to be given to any accused person who has been discharged, before further inquiry into his case is ordered by a competent authority, that is, by the High Court, or the Sessions Judge or the District Magistrate. Nevertheless as a matter of judicial discretion it is advisable that previous notice should issue when the matter for consideration is the setting aside of an order of discharge in favour of the accused person who has been actually before the court to answer the facts alleged against him. *Queen-Emperor v. Ajudhia*, I. L. R., 20 All., 839, referred to.

Emperor v Abdul Latif 416

SECTION 438, *See* Act No. XLV of 1860, section 266 84

SECTIONS 439 AND 476—*Revision—Jurisdiction of High Court—Order for prosecution passed by a District*

Magistrate instead by a Collector acting as a Court of Revenue.] The Collector of a district in deciding a Revenue appeal came to the conclusion that a receipt filed in the case was not genuine. He took no action at the time as a Court of Revenue, but subsequently, acting as District Magistrate, he held an inquiry into the matter of the receipt and sent the person whom he thought to be concerned with the making of the receipt to a subordinate magistrate for trial. *Held*, that the High Court had jurisdiction to interfere in revision and that the order passed by District Magistrate was *ultra vires*.

Emperor v. Ram Sahu 144

CRIMINAL PROCEDURE CODE SECTION 476—Jurisdiction—Order for prosecution of persons not parties to a proceeding before the Court.] A court in taking action under section 476 of the Code of Criminal Procedure is not restricted, as regards the person against whom an order may be made, to the parties to a proceeding pending before it. *Jadumandan Singh v. Emperor*, 1. L. R., 37 Calo, 250, dissented from.

Emperor v. Ganga Ram 24

SECTIONS 476 AND 478—Commitment made by a Munsif in the United Provinces to the court of a Sessions Judge in the United Provinces in respect of offences alleged to have been committed in Bengal.] Where in the course of a judicial proceeding before the Munsif of Fatehabad in the district of Agra certain offences under sections 193, 209, 216, 467 and 471 of the Indian Penal Code which appeared to have been committed in Bengal were brought under the notice of the Court, and the Munsif committed the persons suspected of such offences for trial to the Court of Session at Agra. *Held*, that the Court had jurisdiction under section 478 read with section 476 of the Code of Criminal Procedure to make the commitment.

Emperor v. Khushali Ram 116

SECTION 478—Procedure—Commitment made by Munsif without following procedure laid down in the section—Commitment quashed.] A Munsif holding an inquiry under the latter portion of section 478 of the Code of Criminal Procedure with a view to making a commitment to the Court of Session is bound to follow substantially the provisions of chapter XVIII of the Code.

Where in such circumstances the Munsif neither examined the witnesses in the presence of the accused nor explained the charge to them, the commitment was quashed as being bad in law.

Emperor v. Babu Prasad 32

CRIMINAL TRESPASS, See Act No. XLV of 1860, section 441 .. 221

CROSS OBJECTION, See Act No. VII of 1870, schedule I, article 1 .. 93

— See Civil Procedure Code (1908), order XLI, rule 22 536

CRUELTY, See Muhammadan law 332

CULPABLE HOMICIDE, See Act No. XLV of 1860, sections 304 and 325 103

— See Act No. XLV of 1860, sections 325, 300, exception 4 .. 686

CUSTOM, See Pre-emption 617, 626

DECREE—Condition of decrees ordering a plaintiff to make a payment within a specified time—Court not competent to extend time limited—Civil Procedure Code (1908), section 114—Review of judgment—Jurisdiction.] Except in the case of mortgage decrees, where a court by its decree orders a party to make a payment, or take certain action

within a specified time and provides that certain detrimental consequences shall follow in the event of non-compliance with its order, the Court itself has no jurisdiction to extend the time limited by the decree, save on an application for review under section 114 read with order XLVII, rule 1, of the Code of Civil Procedure *Nail Ram v. Bhaywan Chand*, 15 A. L. J. 511, overruled.

<i>Sajjadi Begum v. Dilawar Husain</i>	579
DECREE. Construction of—, <i>See</i> Civil Procedure Code (1908), order XXXIV, rules 4, 5 and 10	109
—passed against deceased person, <i>See</i> Civil Procedure Code (1908), order XXI, rule 7	423
DEFAMATION, <i>See</i> Act No. 1 of 1872, section 132	271
— <i>See</i> Label	341
DISCHARGE, <i>See</i> Criminal Procedure Code, section 437	416
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— <i>See</i> Act No. IX of 1872, section 65	558
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ESTOPPEL, <i>See</i> Civil Procedure Code, section 60(c); order XXI, rule 92	680
— <i>See</i> Hindu law	487, 598
EVIDENCE— <i>Statement in wajib-ul-arz—Suit to recover 'parjot'.</i> Plaintiff sued as owner of the <i>abadi</i> of a village to recover a certain number of maunds of cotton seed from the defendants who were banias having shops in the said <i>abadi</i> , and the claim was based mainly upon an entry in a <i>wajib-ul-arz</i> framed some fifty years before suit, to the effect that tenants living in the village did not pay " <i>hiya</i> " (rent of a house) but " <i>parjot</i> " (ground rent), which, for banias, was one maund of cotton seed for year a each shop. <i>Held</i> , that the entry in the <i>wajib-ul-arz</i> was reliable evidence of the liability of the defendants to pay " <i>parjot</i> " to the zamindar in the manner described, and that the use of the word indicated that the origin of the payment was an agreement between the inhabitants of the <i>abadi</i> and the zamindar rather than a custom.	
<i>Muhammad Faiyaz Ali Khan v. Bihari</i>	56
— <i>See</i> Act No. XVIII of 1879, section 86	153
— <i>See</i> Criminal Procedure Code, sections 110 (f) and 117	372
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EXECUTION OF DECREE.— <i>Limitation—Decree giving mesne profits to be ascertained in the execution department—Terminus a quo.</i> The decree in a suit for redemption of a usufructuary mortgage provided that certain mesne profits were payable to the mortgagor, the mortgage having been more than satisfied by the profits of the property. The amount of mesne profits was to be ascertained in the execution department. <i>Held</i> that as regards execution of the decree in respect of such mesne profits time did not begin to run against the mortgagor until the profits had in fact been ascertained. <i>Muhammad Umarjan Khan v. Zinat Begum</i> , I. L. R., 25 All., 885, followed.	
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— — — — — <i>See</i> Civil Procedure Code (1882), section 315	411
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HINDU LAW— <i>Adoption by widow of son to deceased husband—Subsequent suit by her to set aside adoption on ground that she had no authority—Its appeal, dismissal of suit on ground of—Decision by Privy Council that she had authority and that adoption was valid—Decree properly made against widow representing estate, binding effect of on reversioner—Res judicata—Civil Procedure Code (1908), section 11.]</i>	
After adopting a son to her deceased husband a Hindu widow, in a suit by an alleged reversioner against her to set aside the adoption on the ground that she had no authority from her husband to make the adoption, alleged in her written statement and stated in court through her pleader that she had authority to make the adoption, and that it was valid. The suit was dismissed because the plaintiff was found not to be a reversioner. The widow then brought a suit against the adopted son to set the adoption aside, pleading that she was not vested with authority from her husband to adopt and denied having made the adoption. The adopted son contested the suit and it was decided by the courts in India on the ground that the widow was estopped from maintaining it. On appeal however, the Privy Council raised an issue as to her authority to adopt, and held on the evidence on that issue that the adoption was valid. In a suit by an alleged reversioner to the estate of her husband against the adopted son for a declaration that the adoption was invalid and for possession of the estate	
<i>Held</i> , that, notwithstanding the personal estoppel which bound her, the widow represented the estate on the question of fact as to whether the defendant (respondent) had or had not been validly adopted, and that she represented it within the meaning of the rule laid down in <i>Katana Natchiar v. The Rajah of Shivogunga</i> , 9 Moo, I. A., 539, and under the circumstances the decree against her would bind the reversioners.	
Though the rule of <i>res judicata</i> as enacted in section 11 of the Code of Civil Procedure, 1908, was not strictly applicable, as the appellants (plaintiffs) were not parties to the widow's suit against the adopted son and did not claim through a party to that suit, yet the principle of <i>res judicata</i> had been rightly applied by courts in India so as to bind reversioners by decisions in litigation fairly and honestly given for or against Hindu females representing estates. In the absence of all authority their Lordships could not decide that a Hindu lady, otherwise qualified to represent an estate in litigation, ceases to be so qualified merely owing to personal disability or disadvantage as a litigant, although the merits of the case were tried, and the trial was fair and honest.	
Bisal Singh v. Balwant Singh	598
— <i>Alienation—Mortgage by manager of joint family who was not father of the other members—Burden of proof of legal necessity for mortgage—Where no necessity proved the interest of such manager not saleable in enforcement of mortgage—Mortgage only operative to the extent to which the mortgage money was proved to be necessary.]</i>	
The mortgage of joint estate made by the manager of a joint family who is not the father of the other members of the family can only be justified so far as it is wanted for the joint family purposes. If the necessity cannot be established by direct evidence, it may be assumed if it can be shown that reasonable care was taken to ascertain if such circumstances existed, and the transferee acted in good faith [section 38 of the Transfer of the Property Act (IV of 1882)]. In either case the burden of proof lies on the person who claims the benefit of the mortgage. <i>Bhanga Chandra Dhar Biswas v. Jagat</i>	

Kishore Acharjya Chowdhuri, I. L. R., 44 Calc., 186; L. R., 43 I. A., 249, followed.

The was no difference between the burden of proof when it is desired to support a mortgage made by a manager of a joint estate, and that which is required to support the mortgage made by a widow who has only a similar limited power of disposition.

If the deb. was not incurred for family necessity, the interest of the manager of the family with respect to mortgages in the same province as that from which the present case has been brought, cannot be sold in enforcement of the mortgage. *Lachman Prasad v. Sarnam Singh*, I. L. R., 39 All., 500; L. R., 44 I. A., 169, referred to.

In the present case the mortgagee had only discharged the burden thrown upon him of proving necessity for the deed to the limited extent as held by the High Court, and the security, therefore, stood only to the limited extent proved.

Anant Ram v. Collector of Etah. 171

HINDU LAW—Bond—Suit on bond executed by deceased Hindu against his widow and brothers—Form of decree.] Plaintiff, after the death of the obligor, a Hindu, sued his widow and brothers to recover the amount due on a bond. It was found that the obligor and his brothers were joint. Held, that the plaintiff was still entitled to a decree against the widow which might be executed against any self-acquired property of the deceased obligor in her hands.

Pahalwan Singh v. Janki 17

Gift—Gift to Hindu female—Construction of document—“Malik mustaqil.”] A Hindu, being the full owner of certain property, made a gift thereof to his widowed daughter-in-law, describing the donee in the deed as *malik mustaqil*. There was no circumstance to counter-indicate that the donor intended that the donee should take less than the full estate in the property comprised in the deed.

Held that the donee took all the estate of the donor. *Surajmani v. Rabi Nath Ojha*, I. L. R., 30 All., 84, referred to.

Naulakhi Kunwar v. Jai Kishan Singh 575

Hindu widow—Gift—Suit to contest alienation made by widow—Plaintiff not nearest reversioner.] In order that a reversioner may be able to maintain a suit to contest an alienation, made by a Hindu widow, of her husband's property he must either be the next presumptive reversioner or he must show that the nearer reversioners are colluding with the widow. *Rani Anand Kunwar v. The Court of Wards*, I. L. R., 6 Calc., 714, and *Meghu Rai v. Ram Khelawan Rai*, I. L. R., 35 All., 376, followed. *Raja Dei v. Umed Singh*, I. L. R., 34 All., 207, distinguished.

Gumanan v. Jahangira 518

Inheritance—Descent of taluqa in Oudh—Oudh Estates' Act (I of 1869), sections 7, 8, 9, 22—Sanad granting descent by primogeniture—Properties subsequently acquired—Accretions and 'proetie' appurtenant to taluqa—Property purchased by taluqadar—Intention to vary descent—Substitution of villages by Government—Crown Grants Act (XV of 1895), section 1—Power of Crown to alter or limit descent—No such power in subject.] In British India the Crown has power to grant or transfer lands, and by its grant or on the transfer, to limit in any way the descent of such lands. But a subject has no right to impose upon lands or other property any limitation of descent which is at variance with the ordinary law of descent applicable to the particular lands or property so dealt with.

The present appeal related to a taluqa granted in 1861 by the Crown to a Hindu, the grant containing a condition that "in the event of your dying intestate or of your successor dying intestate, the estate should descend to the nearest male heir according to the rule of primogeniture." On the death of one of the holders of the taluqa, a suit was brought, which in 1905 came on appeal to the Privy Council for decision as to the succession to the deceased taluqdar's estate, and an Order in Council was made which declared that "the taluqa is constituted at the date of the sanad with accretion (if any) or properties (if any) appurtenant to the taluqa" passed to the appellant as the next male heir according to the rule of primogeniture, but that the residue of the property passed to the respondent, and the suit was remitted to India for determination under the Order in Council. There was no allegation of any family custom of primogeniture. On appeal from the final decrees of the Judicial Commissioner—

Held, that under the Order in Council villages substituted by the Government for some of those held under the sanad, and a house granted by the Government after 1861 to the taluqdar, for his use as taluqdar, passed to the appellant as taluqdar property, but that villages purchased after 1861 by the deceased taluqdar passed to the respondent as non-taluqdar property and it was immaterial whether it was or was not the intention of the deceased taluqdar to incorporate them with the taluqa.

Rajindia Bahadur Singh v. Raghubans Kunwar ..

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HINDU LAW—*Joint family—Mitakshara—Managing member keeping accounts of joint funds and of his own self-acquired property in same account book—Entries in such book evidence of intention to make self-acquired property joint—Purchases made in name of son-in-law out of funds so blended to provide for son-in-law—Statement to that effect made by manager, admissible as being against his own interest—Benami deeds—Civil Procedure Code (1882), section 317*] With respect to a Hindu joint family the law is that while it is possible that a member of the joint family can make separate acquisition and keep moneys and property so acquired as his separate property, yet the question whether he has done so is to be judged by all the circumstances of the case

Where a member of a joint Hindu family at Lucknow, who had made considerable savings from his earnings as a pleader at Hardoi, where he was entrusted with the management of the joint family property at that place, eventually became managing member of the joint family at Lucknow, kept the accounts of the joint property and of his own separate earnings in one account book and had purchased properties in the name of his son-in-law out of the sums entered in the account book

Held, that by so blending his private savings with receipts and payments on joint account, he showed an intention to make these joint property, and they must be presumed to be joint.

But it did not follow that all purchases entered in the book were made for the joint family. As regarded the purchases in the name of his son-in-law, his statement that they were made to provide for the son-in-law was a statement against his own interest and therefore was admissible in evidence. Such a statement together with the other evidence in the case was sufficient to give the son-in-law a title to the subject of such purchases as against the claim of the joint family

Suraj Narain v. Ratim Lal

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Joint Hindu family—Partition—Agreement for partition of property of their husbands executed by two Hindu widows—

Circumstances invalidating such agreement] Two brothers, constituting a joint Hindu family, died within a year of each other, each leaving a widow surviving him. The two widows executed a deed of partition of the property of their husbands, in which it was recited that the husbands had died on certain dates; that they had been joint "in food, business and everything," but also, nevertheless, that the executants "became the owners of the property left by their husbands in equal shares." The property was never physically divided, and some time later the widows brought two suits - the one asking for actual partition according to the deed, and the other (the widow of the brother who died last) for possession of the whole estate.

Held, that the latter was entitled to succeed. Either the gratuitous alienation by her of one half of the property to which she was entitled was the result of deception practised upon her by some one better acquainted with the facts, or else both parties to the deed of partition were under a common mistake regarding their respective rights.

Lachmi Kunwar v. Durga Kunwar 819

HINDU LAW—*Leprosy—Development of leprosy not a disqualification as regards capacity to deal with property*] There is no principle of Hindu law under which a person who contracts the disease of leprosy is thereby disqualified from dealing with his own property or from dealing with joint family property so as to bind his sons, provided the alienation is made for legal necessity.

Man Singh v. Musammat Gami 77

Mitakshara—Joint Hindu family—Hindu widow—Widow's right of residence in joint family house—Effect of alienation during the life-time of widow's husband] When a right of residence or maintenance comes into existence in favour of the widow of a man who was lately a member of a joint Hindu family, she takes that right in the property as it stands at the time of her husband's death. She cannot set up her right of maintenance or residence as against alienations effected during the life-time of her husband. *Ajudhia P. Asad v. Jasola*, Weekly Notes, 1887, p. 279, followed.

A widowed daughter-in-law is debarred from setting up the plea of the invalidity of an alienation effected by the father-in-law during her husband's life-time. *Sohni v. Mohun Kue*, 9 A. L. J., 23, followed.

Ramzan v. Ram Darya 6

Partition—Right of a third party to half of the property partitioned subsequently established by suit—Right of ignorant parties to re-partition.] One of two brothers sued the other for partition of what they alleged to be the joint family property. The suit was compromised, and a partition was effected which was embodied in a decree. Subsequently, however, a cousin of the parties established by suit his title to one half of the family property which had been already divided between the two brothers. *Held* that, it was open to the two brothers—if not so nomine to re-open the partition already effected—at any rate to ask the court to adjust as between them the loss occasioned by the success of their cousin's suit. *Masauti v. Rama*, I. L. R., 21 Bom., 333, referred to.

Ganeshi Lal v. Babu Lal 374

Reversioners—Compromise of disputes between the widow of the last male owner who took the whole estate of a Hindu joint family by survivorship and other widows of family entitled only to maintenance and person who claimed to have been adopted by one of the

widows:—*Division of the property between them.—Claims inducing widow of sole male owner to agree to take less than she is entitled to and alter her position to her detriment.—Future claim by alleged adopted son for possession of, whole estate.—Estoppel of claim as reversioner by compromise proceedings.*] At the time of his death in 1883 *B*, one of three brothers, was by survivorship the sole owner of the estate of a Hindu joint family, and his widow became entitled to that estate for life. Her title was, however, disputed by the present appellant and by *P* and *K*, the widows of the predeceased brothers of *B*. The appellant set up a claim to the entire family estate based on the allegation that he had been adopted by *P* to her deceased husband, and was entitled as such adopted son to the whole property. *P* supported his claim, and together with *K* alleged that the three brothers had separated and that their three widows were each entitled to a one-third share of the estate. To protect her own interests and those of her daughter, the widow of *B* brought two suits; one of the 20th of January, 1891, against the appellant and *P* for a declaration that the appellant's alleged adoption was null and void. That suit was dismissed on a technical ground, and an appeal against the decree dismissing it was preferred to the High Court at Allahabad. The other suit was brought on the 4th of February, 1892, against *P* and *K* claiming a declaration that *B*, her late husband, had been the sole owner and possessor of the entire family property, that on his death she was herself in possession of and entitled to that property according to Hindu law, and that *P* and *K* had no rights in it except to maintenance. Before the second suit came on for hearing, *B*'s widow, her daughter, *P*, *K*, and the appellant had, on the 1st of August, 1892, entered into a compromise referring their disputes to arbitration, the result of which was that *B*'s widow, her daughter, *P*, and *K*, each obtained possession of a one-fourth share of the property in dispute. The appellant, though allotted no share of the family property, obtained the share allotted to his adoptive mother *P*, who relinquished it to him by executing a deed on the 22nd of August, 1898, in his favour. In the award it was stated that the appellant had been adopted by *P*, but that he had nothing to do as such adopted son with the shares allotted to the other ladies. He obtained in accordance with *P*'s deed of relinquishment mutation of names in his favour. The appeal in *B*'s widow's first suit was not supported and was dismissed, and the second suit was withdrawn. In suits filed respectively on the 15th of July, 1912, and the 28th of August, 1913, by the appellant for possession, as reversioner to the estate of *B*, of the properties allotted in January, 1893, to *B*'s widow, her daughter, and *K* respectively.

Held (affirming the decision of the High court) that the appellant was precluded from claiming as a reversioner by his having been a party to the compromise entered into in 1892, which, and the awards made in accordance with it, were binding on him. He had at that time no right of any kind to any share of the property of the family; at best he had the mere expectancy of being reversioner on the death of *B*'s widow.

Sumsuddin Goolam Husein v. Abdul Husein Kalimuddin, I. L. R., 31 Bom., 165, distinguished.

The claim of the appellant influenced *B*'s widow, who was induced mainly by that claim, but also by the claim of *P* and *K*, to consent to a division of the family property in which she only obtained a one-fourth share. By those claims she was induced to agree to a compromise against her own interests and those of her daughter and to alter her position greatly to her own detriment. The appellant was a party to it, and under it he obtained a substantial benefit which he has ever since enjoyed. He was

consequently bound by the compromise, and could not now claim as a reversioner.	
Kanhai Lal v. Brij Lal	437
HINDU LAW — <i>Succession—Hindu widow—Unchastity in husband's life-time—Condonation by husband</i>] Under the Hindu law, a widow is not debarred from inheriting to her husband on the ground that she had become unchaste in her husband's life-time, if the husband had condoned her unchastity. <i>Gingultha Pu appa Alur v. Yellu Kom Viraswami Shrivalli</i> , 1 L R. 33 Bm, 1 S, followed. <i>Matungnee Dales v. Jeykallu Dales</i> , 14 W R, A O. J., 23, and <i>Monsam Kolita v. Kari Kolitani</i> , 1 L R, 5 Cal, 76, result.	
Radhe Lal v. Bhawani Ram	178
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— See Act No. II of 1899, sections 40 and 57	128
— See Civil and Revenue Courts 51, 646	
— See Civil Procedure Code (1908), section 28	525
— See Criminal Procedure Code, sections 107, 125 and 438	140
— See Criminal Procedure Code, section 145	864
— See Criminal Procedure Code, section 350	397
— See Criminal Procedure Code, sections 439 and 476	144
— See Criminal Procedure Code, section 476	24
— See Criminal Procedure Code, sections 476 and 478	116
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<p>LIBEL—Defamation—Privilege—Civil liability of petitioner for statement made by him in a petition presented to criminal court] A person presenting a petition to a criminal court is not liable in a civil suit for damages in respect of statements made therein which may be defamatory of the person complained against.</p> <p>In the absence of Statute law in India regarding civil liability for libel, there is no reason why the English law applicable thereto should not be followed, according to the ruling of the Privy Council in <i>Waghela Rajsangji v. Sheikh Masluddin</i>, L. R., 14 I A, 89. <i>Abdul Hakim v. Tej Chand, Mukharji</i>, I. L. R., 8 All, 115, overruled <i>Augada Ram Shaha v. Nemas Chand Shaha</i>, I L. R., 23 Calc., 867, dissented from.</p>	
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MORTGAGE— <i>Prior mortgagees who had obtained a decree absolute for sale but had not executed it—Decree barred under schedule II, article 179, of Limitation Act, 1877—Subsequent mortgagee not made a party to suit under section 85 of Transfer of Property Act, 1882—Registered later mortgage as notice to prior mortgagee—Suit to enforce later mortgage—Prior mortgagee's right merged in decree and extinguished—Transfer of Property Act, section 89, construction of.]</i> The question in this appeal was whether property mortgaged to the respondent on the 15th of October, 1881, should, when sold, under a decree absolute for sale, be treated as sold subject to an alleged prior right of the appellant under an earlier mortgage of the same property, dated the 25th of February, 1880.	
<p>The appellant, in 1883, acquired the title of the mortgagor, and also such title as remained to the mortgagee, under the earlier mortgage. In 1892, the prior mortgagee brought a suit on his mortgage, and in 1895 obtained a decree absolute for sale under the Transfer of Property Act. The suit was, however, only against the mortgagor, and the second mortgagee was not made a party to it. Neither the prior mortgagee nor his successor took any steps to execute that decree, and it became barred and inoperative after the lapse of three years from the date on which it became absolute. It was admitted that the later mortgage was duly registered, and that the earlier mortgagee must be taken to have had notice of it when he brought his suit and obtained a decree in 1892.</p> <p><i>Held</i>, in a suit brought on the 26th of July, 1910, by the first respondent on his mortgage of the 15th of October, 1881, against, among others, the appellant, that respondent was entitled to a decree absolute under order XXXIV, rule 2, of the Code of Civil Procedure, 1908, for sale, but that the sale was not subject to the prior mortgage of the appellant.</p> <p>The true construction of section 89 of the Transfer of Property Act is that on the making of the order absolute for sale under that section, the security as well as the defendant's right to redeem were both extinguished, and that for the right of the mortgagee under this security there was substituted the right to a sale conferred by the decree.</p>	
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MUHAMMADAN LAW— <i>Gift made during his last illness by a son to his mother—Marz-ul-maut—Application of doctrine</i>] On a question of the application of the doctrine of <i>marz-ul-maut</i> to a disposition of property made by a Muhammadan during his last illness, if the transaction is a sale, the doctrine would not apply at all; if the transaction is a waqf, it would be valid to the extent of one-third; while if it is a gift, it would not be valid at all.	
In the case before the Court the particular transaction was held on the facts to be really a gift to one of the heirs (the mother of the donor) and therefore invalid, although in form it purported to be a sale.	
Fazl Ahmad v. Rahim Bibi	238
— <i>Pre-emption—Sale disguised as a lease in order to defeat pre-emption—Device not permissible under the Muhammadan law.</i>] In a suit for pre-emption, whether the right is claimed under the Muhammadan law or by virtue of a custom of pre-emption, it is the duty of the Court, if the question is raised, to consider and decide whether the transaction in respect of which the claim is brought is or is not in substance, a sale, though it may be disguised in some other form, as for instance, in that of a lease.	
There is no rule of Muhammadan law which renders it permissible for a transaction of sale to be framed as a lease so as to avoid claims for pre-emption.	
Muhammad Niaz Khan v. Muhammad Idris Khan	322
— <i>Suit for restitution of conjugal rights—Defence to suit—Cruelty.</i>] In a suit by a Muhammadan husband against his wife for restitution of conjugal rights it was found on issues remitted by the High Court, that there was no very satisfactory evidence of actual physical cruelty, but that the parties were on the worst possible terms, and the reasonable presumption was that the suit was brought for the purpose of getting possession of the defendant's property. There had been a good deal of ill-treatment short of physical cruelty and the court was of opinion that by a return to her husband's custody the defendant's health and safety would be endangered. In these circumstances the High Court refused to interfere with the decree of the Court below dismissing the suit. <i>Armour v. Armour</i> , 1 A. L. J., 318, referred to.	
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OCCUPANCY TENANT— <i>Mortgage of part of occupancy holding—Subsequent lease of same while mortgage was yet unregistered—Rights of mortgagees and lessee.</i> An occupancy tenant in default of usufructuary mortgage of certain plots of land comprised in his occupancy holding. He apparently gave the mortgagees possession, but refused to get the mortgage deed registered, and in consequence the mortgagees were obliged to bring a suit to compel registration. Whilst this suit was pending, the occupancy tenant leased certain plots covered by the mortgage at a yearly rent for a period of five years.	
<i>Held</i> , on suit by the lessee for possession, that the plaintiff was entitled to a decree, and that he was not bound, as a condition precedent, to pay off the mortgage. <i>Bahon Upadhya v Uttumga</i> , I L R, 33 All., 779, referred to.	
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PARTNERSHIP— <i>Death of one partner leaving a minor son—Suit by surviving partner against minor for rendition of accounts.</i> <i>Procedure</i> One of two partners in a specific business, who was alleged to have been the managing partner, died, leaving him surviving a minor son. The other partner sued the minor, as his father's representative, for rendition of accounts and for payment of what might be found due to him (the plaintiff).	
<i>Held</i> , that suit was maintainable, but the proper procedure was for the court to direct both sides to produce their accounts and thereafter to pass a decree for whatever sum might appear to be due from one party to the other.	
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PRE-EMPTION— <i>Custom—Wajib ul az—Right of pre-emption acquired by means of imperfect partition of the village</i> There being a pre-existing custom of pre-emption in a village, a right of pre-emption may arise in favour of an individual co-sharee just as much by the creation of a new patti by imperfect partition as by purchase by the co-sharee of a share in the patti. <i>Mahadeo P Ashad Sahu v Jaipal Rawl</i> , 8 Indian Cases, 867, dissented from.	
Lalta Prasad Chaudhri v. Gokul Prasad	617

PRE-EMPTION—*Purchases made by vendee on different dates—Suit to pre-empt first sale only—Vendee claiming to be a co-sharer in virtue of second purchase—Suit not maintainable*] The defendant purchased shares in a village on two different dates. The plaintiff sued to pre-empt the earlier sale but no suit was brought in respect of the second sale. *Held* that the suit was not maintainable.

Chabraj Singh v Mahesh Narain Singh 572

— *Wajib-ul-arz—Custom—Mortgage by conditional sale*] In 1895 a mortgage was made consolidating previous mortgages of the years 1892, 1893 and 1894. In 1906 a suit was instituted on the mortgage, which was constituted as a mortgage by way of conditional sale. A decree for foreclosure was obtained, and in 1911, the decree was made absolute. Shortly afterwards, possession was obtained under this decree. In 1914 a suit was brought claiming to get possession by virtue of a custom set forth in the *wajib-ul-arz*. The clause relating to pre-emption was as follows:—“If a *pattidar* wishes to transfer his share by sale or mortgage, he should do so, first, to another *pattidar* of the same *thok*, and in case of his refusal, to the *pattidars* of another *thok* of the village. If the *pattidar* wants to sell his share to a stranger by entering an excessive and fictitious price, the *pattidar* having the right of pre-emption shall be entitled to acquire the property on payment of the price awarded by the arbitrators.” *Held* that, having regard to the whole context of the *wajib-ul-arz* the ‘sale’ mentioned therein for the purpose of giving rise to a right of pre-emption according to custom meant a voluntary sale, and the *wajib-ul-arz* did not give him a right of pre-emption under the circumstances under which the mortgagees became the owner of the property. *Alu Prasad v Sukhan*, I. L. R., 3 All., 610, distinguished.

Sundar Kunwar v Ram Ghulam 616

— *Wajib-ul-arz—Property to be sold to co-sharer first—Sale to stranger—“Refusal to purchase”*] As a general rule the custom as to pre-emption as evidenced by the record in the *wajib-ul-arz*, is that where a co-sharer wishes to sell his property he must first offer it to another co-sharer and if the co-sharer refuses to purchase, he is entitled to go to a stranger. Where the custom proved is of this nature, if the co-sharer (vendor) offers the property to another co-sharer and such co-sharer refuses to purchase on the ground that he has no money or is unwilling for any other reason to purchase, the owner of the property is entitled to go and sell it to a stranger, and he is not obliged, after he has made a definite agreement with the stranger, to return and offer the property a second time to the co-sharer. *Naumihal Singh v Ram Ratan*, I. L. R., 39 All., 127, and *Nathu Lal v Dhanu Ram*, 15 A. L. J., 315, followed. *Munawar Husain v Khadam Ali*, 5 A. L. J., 331, and *Kanhari Lal v Kalka Prasad*, I. L. R., 27 All., 670, not followed.

Shamshei Singh v Piaru Dat 690

PRIVY COUNCIL Practice of—*Omission to appeal to High Court—Decision of a subordinate court not submitted to High Court—Point taken in grounds of appeal to High Court but not pressed—Postponing appeal from interlocutory decision until appeal from final decree*] It is a well settled rule of practice of the Judicial Committee that an appellant when bringing up the actual decree of the High Court for review, shall not be allowed to ask to have it set aside on the ground that it has wrongly accepted a decision of the subordinate court if he himself has never brought that decision before the High Court for its consideration. Such a request would be fair neither to the Court appealed from, nor to the Board appealed to. The High Court ought not to be liable to have its determination overruled upon matters never submitted to it. The

Board ought not to be called on to adjudicate finally upon matters where they have not the advantage of knowing and weighing the view taken by the learned Judges of the High Court. This had nothing to do with waiting to question an interlocutory decision until an appeal is taken from a subsequent final decree.

The same rule applies where, on appeal to the High Court, the point was mentioned in the notice of appeal, but the judgment of the High Court says of it that the appellants' advocate "stated that he did not desire to press it," and so no more is said about it.

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REGULATIONS—1806—XVII, SECTION 8— <i>Mortgage by way of conditional sale—Suit for redemption—Plea of foreclosure under the Regulation—Procedure—Evidence</i>] In the case of mortgage to which Regulation No. XVII of 1806 applies, before it can be held that the right of redemption is barred, it must be proved that the requirements of the Regulation have been strictly complied with, that is to say, the mortgagee had served upon the mortgagor a notice, under the seal and official signature of the District Judge, warning him that the mortgage would be finally foreclosed in the event of his failure to redeem within the period of one year. <i>Badal Ram v. Taj Ali</i> , 4 A. L. J., 717, followed.	
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TIMBER—*Standing timber—Mango tree—Mango tree may be standing timber according to the custom of a locality—Registration Act (XX of 1866), Sec. 3—Trees.] By the term "timber" is meant properly such trees only as are fit to be used in building and repairing houses.*

A mango tree, which is primarily a fruit tree, might not always come within the term "standing timber" used in the definition of immoveable property in section 3 of the Indian Registration Act (XX of 1866). But it may be classed as a timber tree where according to the custom of a locality its wood is used in building houses.

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TOLLS ACT (BOM. ACT III OF 1875), SEC. 10, AND BOM. ACT V OF 1881, SEC. 2—*Lease—Condition—Breach of condition—Illegal contract—Contract Act (IX of 1872), Sec. 23]* Under section 10 of the Tolls Act (Bombay Act III of 1875), Government leased to plaintiff the levy of tolls on certain conditions. One of the conditions was that plaintiff should not sublet the tolls without the permission of the Collector previously obtained. One of the clauses of the lease provided that for a breach of any of the conditions of the lease, the Collector might impose a fine of rupees two hundred. The plaintiff sublet the toll to the defendants without the permission of the Collector and sued to recover a certain amount which the defendants promised to pay for the sublease. The defendants contended that the contravention of the condition of the lease was illegal and opposed to public policy; that, therefore, the contract was void under section 23 of the Contract Act (IX of 1872), and that the plaintiff was not entitled to recover the amount.

Held, that the plaintiff was entitled to succeed. The agreement to sublet was not illegal or opposed to public policy merely because it was forbidden under a pecuniary penalty by conditions in the lease to the plaintiff. The penal consequences of the breach were limited to the specific penalty and did not make the contract void.

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TRANSFER OF PROPERTY ACT (IV OF 1888), SECS. 40, 54, 55 (6) (b) — *Trusts Act (II of 1882), Sec. 91—Contract of sale—Delivery of possession—payment of the whole of purchase-money—Registered conveyance not executed—Transfer—Attachment—Vendor having no attachable interest.*

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SECS. 87, 88, 89 AND 93—*Mortgage—Decree for sale of mortgaged property—Default in payment on the date fixed in the decree—Redemption—Power to enlarge the time.] In a suit brought by a mortgagee for sale of the mortgaged property, a decree was passed on 27th July 1895, directing that the mortgagor should pay the mortgage debt within six months, and that in default his right of redemption should be foreclosed and the mortgagee should be at liberty to sell the property.*

On the 27th July, 1898, the mortgage applied for an order absolute for sale.

On the 11th October 1898, the mortgagee applied for permission to pay into Court the amount of the decree.

Held, that the application could not be granted. The case fell within sections 87 and 88, and not within section 87 or 93, of the Transfer of Property Act (IV of 1888). The money not having been paid within the appointed time, the Court

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was bound to pass an order absolute for sale ; it had no power to enlarge the time for payment.	
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TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 131 —“ Debt ” —Transfer of a debt—Decree not a debt—Assignment of decree—Notice of assignment—Civil Procedure Code (Act XIV of 1882), Sec. 232.] A decree is not a “ debt ” within the meaning of that word as used in section 131 of the Transfer of Property Act (IV of 1882), so as to make a transfer thereof void without express notice.	
When a decree is assigned, a notice given under section 232 of the Civil Procedure Code (Act XIV of 1882) is sufficient.	
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A mango tree, which is primarily a fruit tree, might not always come within the term “ standing timber ” used in the definition of immoveable property in section 3 of the Indian Registration Act (XX of 1886). But it may be classed as a timber tree where according to the custom of a locality its wood is used in building houses.	
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VATAN—Restriction upon alienation by a vatandár—Mortgage invalid to what extent—Regulation XVI of 1827—Act III (Bombay) of 1874.] An alienation by way of mortgage of vatan property, or any part of it, executed when Regulation XVI of 1827 was yet in force, had no operation beyond the life of the vatandár who mortgaged. The mortgage was in its inception void against the heir of the vatandár, and had not become validated against the heir by reason of the repeal of the sections in Regulation XVI of 1827, relating to this subject, by (Bombay) Act III of 1874.	
• <i>Kalu Narayan Ku'karni v. Hannappa bin Bhimappa</i> ((1879) 5 Bom., 435) referred to and approved.	
The childless widow of a vatandár, deceased in 1847, was the recognised vatandár in possession in 1865. She mortgaged two villages of the vatan to the father of the respondents. The latter two, after litigation, retained possession in 1886, by order of the Commissioner in the Revenue Department, until there should be a decree of Court to the contrary. The widow, according to the judgment below, had held the vatan adversely to her late husband's son, the plaintiff, who was born in 1848 of her co-widow, and he was the true heir, entitled from his birth. But the High Court gave effect to the adverse possession of the widow for the period of limitation supporting the mortgage. The plaintiff was the sole heir of the widow, his step-mother, who died in 1877.	

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The appellant contended that the vatan as inherited by him was free from the mortgage encumbrance, and that he was entitled to possession.	
<i>Held</i> , (reversing the decree of the High Court), that the mortgage was void against the heir, and had no force beyond the life of the vatandár who had executed it. The decree of the Subordinate Judge to that effect, and for possession, was maintained.	553
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VATAN—Succession to a vatan—Bombay Act V of 1886, Sec. 2—Widow—Rights of succession of a widow other than the widow of the last holder—Adoption by such widow—Collateral male member.] Under section 2 of Bombay Act V of 1886, if there is a male member of a vatandár family, the succession goes to him in preference to a female member, and on his death the succession will go to his heirs with a similar provision. Where there is a male member qualified to inherit vatan property he inherits, and a widow other than the widow of the last male member acquires no right to the vatan by succession or inheritance, and consequently she cannot create, transfer or revive any rights by adoption.	
A kulkarni vatan was owned by two brothers A and B. B died first and A became the last male holder. A died in 1881 leaving a widow who held the vatan until her death in 1892. On her death, B's widow took a son in adoption. The adopted son filed a suit to establish his title to the vatan against the defendant, who was a male member of the family and had been registered by the revenue authorities as the vatandár on the death of A's widow.	
<i>Held</i> , that the plaintiff could not succeed, the defendant having a better title to the vatan than the plaintiff or his adoptive mother, under section 2 of Bombay Act V of 1886.	484
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VENDOR AND PURCHASER—Contract of sale—Delivery of possession—Payment of the whole of the purchase-money—Registered conveyance not executed—Transfer—Attachment—Vendor having no attachable interest—Transfer of Property Act (IV of 1882), Secs. 40, 54, 55 (G) (b)—Trusts Act (II of 1882), Sec. 91.] Under a contract of sale with respect to certain fields, possession was delivered to the vendee, and the whole of the purchase-money was paid to the vendor, but the transfer was not effected, as the necessary registered conveyance had not been executed. Subsequently a judgment-creditor of the vendor sought for a declaration that the fields were liable to be attached and sold as the property of the judgment-debtor. Before the case was decided by the Court of first instance, registered conveyance had been executed.	
<i>Held</i> , that the judgment-debtor was nothing more than a bare trustee and had no attachable interest in the property.	
Hormaji v. Keshav ((1894) 18 Bom., 13) distinguished.	
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WAGER—Wagering contracts—Satta transactions—Suit to recover brokerage in respect of satta transactions—Bombay Act III of 1865—Contract Act (IX of 1872), Sec. 30.] Plaintiff was employed by defendants to enter into cotton transactions on their behalf at Dholera. The contracts for the sale and purchase of cotton were made on terms contained in a printed form which incorporated the rules framed by the cotton-merchants of Dholera. These rules expressly provided for the delivery of cotton in every case and forbade all gambling in differences. In spite of these rules, and the express terms of the contracts, the course of dealings was such that none of the contracts were ever completed except by payment of differences between the contract price and the market price in Bombay on the <i>Vasta</i> day. The plaintiff entered into numerous transactions of this kind on the defendants' behalf. He now sued to recover from them the balance due to him on account of brokerage, commission and losses incurred in the said transactions.	

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Held, that the transactions were a mere gambling for differences, and no suit would lie, under Bombay Act III of 1865, to recover any of the items connected with such transactions.

In order to determine whether a contract is a wagering contract, the Court will not only look at the terms of the written contract, but also probe among the surrounding circumstances to find out the true intentions of the parties.

Universal Stock Exchange, Limited, v. Strachan (1896) Ap. Ca., 163 and *In re Gieve* (1899) 1 Q. B., 794 followed.

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WARRANTY—*Breach of warranty—Suit on warranty—Principal and agent—Guardian—Minor—Loan obtained by guardian as such—Liability for such loan—Warranty by guardian of authority to borrow—Misrepresentation on a point of law—Contract Act (IX of 1872), Sec. 235.—Guardian's liability.* Plaintiff, having lent a sum of money to one Rupaliba as guardian of her minor son Ranmalsangji, brought a suit against the minor, represented by his guardian, to recover it. In that suit a consent decree was passed, which directed the amount due to him to be recovered out of the minor's estate. On Ranmalsangji's coming of age he got the consent decree set aside, and the plaintiff had to refund the sum which he had recovered under it. Thereupon the plaintiff sued Rupaliba to recover the amount as damages for breach of warranty, alleging that she had represented to him that she had authority to incur the debt on behalf of the minor and to bind his estate, whereas she had really no such authority.

Held, that the plaintiff could not recover, there having been no such misrepresentation as would support an action for a breach of warranty.

Assuming that there was a representation, the only possible representation, if the case be treated as coming within section 235 of the Contract Act (IX of 1872), was that the defendant represented that she was the agent of her son. But as the plaintiff knew that the son was an infant, he must have been aware that any representation that defendant was her infant son's duly authorized agent was incorrect, for an infant cannot appoint an agent, and consequently no warranty, such as would support a suit, could arise out of such a representation.

Even if it were conceded that there was a representation by Rupaliba, as to her power to bind the minor's estate, it was one on a point of law, and as such, it was incapable of supporting the suit.

Beattie v. Ebury (1872) L. R., 7 Ch., 777 followed.

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WILL—*Hindu will—Construction—Vested remainder—Words "mālak and wāras".*

A Hindu died, leaving a will which provided (*inter alia*) as follows:—

"After my death, my wife, if she be alive, is the rightful heir, and if she be not alive, and after the death of my wife, my daughter Bai Nathi is my rightful heir (*hakdār wāras*)"..... "As to my daughter Nathi, whom I have, after the life-time of myself and of my wife, appointed heir to my property, and as to the surplus the heir to the same is my daughter Nathi."

The testator died in 1894; Nathi, in 1895; and the wife in 1897. Thereupon testator's step-mother claimed the property as his reversionary heir.

Held, that under the will Nathi took an estate vested in interest from the testator's death, which would pass to her heirs on her death, and the step-mother would have no title.

There is no real difference in the meaning of the words "wāras" (heirs) and "mālak" (owner).

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WILL—*Nuncupative will of a Mahomedan—Probate and Administration Act (V of 1881), Sess. 3, 24, 25, 26, 62—Indian Succession Act (X of 1865), Sec. 244 and Chap. IX—Probate.* Probate may be granted of a nuncupative will.

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